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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1891

SEA-LAND SERVICE, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND APPENDIX

GERALD A. MALIA
C. MICHAEL TARONE
Ragan & Mason
900 17th Street, N.W.
Washington, D.C.

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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No.

SEA-LAND SERVICE, INC.,

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND APPENDIX

Petitoner prays that a writ of certiorari be issued to reveiw the decision of the United States Court of Claims in this case (No. 473-72) which was entered on March 20, 1974.

OPINION BELOW

The opinion of the Court of Claims, (per Durfee, J.) reproduced in Appendix A,[1] will be reported in ___ Ct. Cl. ___ and is reported at 493 F.2d 1357 (Ct. Cl. 1974).

[1] P. la.

The final opinion and order of the Assistant Secretary of Commerce for Maritime Affairs, *Ex Officio* Maritime Administrator ("MarAd") reproduced in Appendix B,[2] is reported in Pike & Fisher, 13 S.R.R. 447 (1972). The initial decision of the Chief Administrative Law Judge, reproduced in Appendix C,[3] is reported in Pike & Fisher, 12 S.R.R. 197 (1971). The decision of the Contracting Officer (the "C.O.") is reproduced in Appendix D.[4]

JURISDICTION

The decision of the Court of Claims was entered on March 20, 1974. This petition for a writ of certiorari was filed in this Court within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether the court below misconstrued and misapplied the Wunderlich Act[5] so as to effectively withhold *de novo* review of the federal agency's interpretation of contractual provisions of a contract written by that agency to implement a promotional statute; and

2. Whether, the court below adopted a new doctrine which eliminates the fair and reasonable standard for determining value in federal cases.

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[2] P. 1b.

[3] P. 1c.

[4] P. 1d.

[5] 41 U.S.C. §§321-322.

STATUTORY PROVISIONS INVOLVED

The statutes involved are: The Wunderlich Act, 41 U.S.C. §§321-322 and the Merchant Marine Act, 1936, *as amended,* 46 U.S.C. §§1101 *et seq.*, particularly the vessel exchange provisions, 46 U.S.C. §1160(i), *as amended.*

STATEMENT OF THE CASE

On May 13, 1965, Sea-Land entered into Contract No. MA-3856 (the "Exchange Contract") with the United States for the exchange of three of its vessels, the CHATHAM, COLORADO and FANWOOD (the "exchange" or "traded-in" ships) for the three Government-owned vessels, the ARIZPA, WACOSTA and WARRIOR (the "transfer" or "traded-out" ships). The ultimate issue was whether the values assigned by the contracting officer to both the exchange and transfer ships were "fair and reasonable" as required by the Merchant Marine Act.[6] Although MarAd's statutory duty was to determine values which were fair and reasonable, MarAd here set values which were substantially below market value and even below scrap value.

An evidentiary hearing was held at which all testimony as to value was that Sea-Land's vessels were of greater value than the Government-owned vessels. An initial decision by the MarAd's Chief Administrative Law Judge sustained Sea Land's appeal and recommended that Sea-Land be reimbursed in the full amount of $816,904.30 in order to perfect the vessel exchange.

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[6] 46 U.S.C. §1160(i)(2).

The Chief Administrative Law Judge concluded:

> That contrary to Section 510(i)(2) of the Merchant Marine Act of 1936, as amended, [46 U.S.C. 1160(i)(2)] which requires valuation of exchange and transfer vessels as of the date of the exchange and in the same manner, the Contracting Officer (a) deducted $120,000 from the valuations previously established by the Ship Valuation Committee for three Sea-Land C2 exchange vessels covering the estimated cost of in-class work necessary, but not to be performed, and failed to make a corresponding adjustment in the values of the three then Government owned C2 vessels being transferred to Sea-Land which were $38,000 less valuable than the exchange vessels; and (b) reduced the values of the three exchange vessels resulting in a net additional payment to MarAd by Sea-Land of $734,904.30 on the basis of condition surveys performed upon redelivery from operation under a Use Agreement approximately one year after the date of exchange, said reduction occurring more than six months after the exchange vessels had been sold to Waterman S. S. Co. and Conqueror Freighters, Inc., at prices substantially less than current market value. . . [.][7]

The Chief Administrative Law Judge found the fair and reasonable values of the vessels, as follows:

Exchange Vessels		Transfer Vessels	
CHATHAM	$428,000	ARIZPA	$404,250
COLORADO	413,750	WACOSTA	404,250
FANWOOD	418,500	WARRIOR	413,750
	$1,260,250		$1,222,250

[7] Appendix C, p. 26c.

On December 7, 1972, MarAd "rejected" the inital decision of its Chief Administrative Law Judge, and dismissed Sea-Land's appeal with prejudice.

In so doing MarAd ruled, for example:

(a) that the Exchange Ships need not be valued as of the date of the exchange, as required by the statute;

(b) that the valuations of the Exchange Ships need not be made in the same manner as the valuation of the Transfer Ships, as required by a true "exchange";

(c) that the fair and reasonable value of the Exchange Ships was below scrap value;

(d) that the Exchange Ships actually possessed the highest classification but still needed to be "placed in class";

(e) that the words "placing the vessels in class" do not mean "placing the vessels in class"; and

(f) that MarAd's own official statement of "all outstanding classification recommendations" did not cover all in-class work.

The court below simply adopted the opinion of MarAd; dismissed Sea-Land's motion for summary judgment; and granted the Government's cross-motion for summary judgment.

REASON FOR GRANTING THE WRIT

THE COURT OF CLAIMS' DECISION IS A RETREAT FROM WUNDERLICH ACT REVIEW WHICH ANNOUNCES A NEW DOCTRINE OF "FAIR AND REASONABLE VALUE" WHICH WILL APPLY TO ALL FEDERAL CASES AND EFFECTIVELY ELIMINATE THIS STANDARD.

In this case, the Court of Claims, by finding MarAd's decision "binding" under Wunderlich Act standards, has reversed the mandate of the Wunderlich Act. Prior to

the Wunderlich Act, the scope of judicial review was limited, except in cases of fraud, or matters tantamount to fraud. The Act was passed to make review meaningful by expanding the scope of review. Now, however, by this recent decision, the court below has retreated from the principles of review which have been established for twenty years.

The error began with the arbitrary rejection of the Chief Administrative Law Judge's decision. That decision was based on the testimony which was overwhelmingly in Sea-Land's favor, particularly MarAd's witnesses. Instead of a proper review to make the hearing a proper one, MarAd flatly "rejected" that decision.

The court below, instead of the analysis required by the Wunderlich Act, took the easier course. This sort of review of departmental and agency decisions by the court primarily responsible for such review means that the mandate of the Wunderlich Act is being abandoned and, consequently, the administration of the Merchant Marine Act is frustrated.[8]

The court below found:

> The ultimate issue in this case is whether the values assigned by the contracting officer to both the exchange and transfer ships were "fair and reasonable" as required by the Vessel Exchange Act, 46 U.S.C. § 1160(i)(2) (1970).[9]

On the very first issue the Court referred to the cost

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[8] "This illustration of an appalling backwardness in administrative procedure is apparently the rule rather than the exception with MARAD." American Maritime Association v. Stans, 329 F.Supp. 1179, 1183 (D.C.D.C. 1971), *aff'd* 485 F.2d 765 (D.C. Cir. 1973). *See also* American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969); Moore-McCormack Lines, Inc. v. United States, 413 F.2d 568 (Ct. Cl. 1969); New York Shipbuilding Corp. v. United States, 385 F.2d 427 (Ct. Cl. 1967); United States v. Marietta Manufacturing Co., 268 F.Supp. 176 (S.D.W.Va. 1967).

[9] Appendix A, p. 2a.

of "placing" vessels in class.[10] The Court concluded that the meaning of the phrase was as follows:

> We conclude that Congress intended the phrase "the cost of placing the vessels in class" to mean the cost of all class requirement work necessary, as determined *at the time of the exchange*, to put the vessels in a condition which would *then* entitle them to the highest ABS classification and valid certificates from the Coast Guard, PHS and FCC.[11] [Emphasis added, in part].

But by the court's own later admission, it recognized the Exchange Ships possessed the "highest" ABS classification when redelivered to MarAd:

> The traded-in vessels [i.e., Exchange Ships] actually possessed the highest ABS classification at the time they were redelivered to MARAD; each of the three ships were generally in the final months of the fifth grace year. They also possessed valid certificates of inspection from the Coast Guard, PHS and FCC.[12]

Consequently by the court's own rulings there was no class work necessary to "place" vessels in class since they were already "placed" in class.

The next issue is related. Did the statute require the vessels to be valued as of the date of exchange? The court below notes the statutory requirement to value the vessels as of the date of exchange.[13] Next, the court confirms this conclusion,[14] but on the same page rules that the relevant "point in time" was the date of redelivery rather than the date of exchange.[15] Thus, the

[10]Appendix A, p. 6a.

[11]Appendix A, p. 11a.

[12]Appendix A, p. 9a.

[13]Appendix A, 7a: 46 U.S.C. §1160(i)(2).

[14]Appendix A, p. 11a.

[15]Appendix A, p. 11a, n. 14.

court ruled that Congress intended valuations to be made as of the date of exchanges, but that Sea-Land vessels should not be valued on the date of exchange.

Still later the Court said:

> We do not read out of the Vessel Exchange Act the requirement that a ship's fair and reasonable value shall be determined as of the date of exchange. That requirement still stands. We hold only that the requirement is not so inflexible as to preclude adjustment of a ship's fair and reasonable value, determined as of the date of exchange, by the cost of placing the vessel in class, as determined at some later date.[16]

(The "adjustment" in the case of the CHATHAM reduced her value from $468,000.00 to $110,116.76,[17] a figure below scrap value!)

Unless there is judicial review as required under the Wunderlich Act, there is really no purpose to the evidentiary hearing before an Administrative Law Judge or other officer assigned to hear contract appeals. That hearing is the only place where a prompt and full presentation of witnesses and documents can be made and the parties to such federal contract appeals should have the right to a true hearing. That means the federal department or agency involved must give real consideration to the findings of the Judge who heard the witnesses and not simply be allowed to "reject" their decision simply because the agency's contracting staff had ruled otherwise. In this case the C.O. had exacted an enormous sum from the contractor, under the guise of a statute intended to assist unsubsidized operators, such as Sea-Land, to modernize the United States-flag

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[16]Appendix A, p. 17a.

[17]Appendix A, pp. 3a, 5a.

fleets[18] in furtherance of the national Merchant Marine policy.[19]

The vessel exchange was subject to the conditions of the Act and the contract was drafted by the Government. As set forth in the Act, the purpose was to "improve the type and suitability of vessels operating in the domestic and foreign commerce of the United States,"[20] by exchanging Government owned vessels with the vessels of unsubsidized carriers for the benefit of those carriers. The House Committee on Merchant Marine and Fisheries and the Conference Committee, in their report accompanying the bill which enacted the 1965 amendment, stated:

> The vessel exchange program was enacted by Congress in 1960 to assist in the modernization and upgrading of the nonsubsidized merchant marine fleet. The program permits operators of nonsubsidized merchant ships to exchange obsolete war-built vessels for more efficient ships in the Government reserve fleet. The trade is made with the Maritime Administration, upon payment of the difference in the estimated value. The program has been a success. The Government has exchanged 52 ships in the reserve fleet for 56 ships in the nonsubsidized fleet and received approximately $4 million in the exchange.[21]

The House Committee on Merchant Marine and Fisheries stated in its report accompanying the bill:

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[18]H.R. Rep. No. 1652, U.S. Code, Cong. & Adm. News, 86th Cong., 2d Sess. 2646 (1960); H.R. Rep. No. 597 and Conf. Rep. No. 1085, U.S. Code, Cong. & Adm. News, 89th Cong., 1st Sess. 3562 (1965).

[19]46 U.S.C. §§1101 *et seq*; 46 U.S.C. §1160(i).

[20]46 U.S.C. §1160(i).

[21]H.R. Rep. No. 597 and Conf. Rep. No. 1085, U.S. Code, Cong. & Adm. News, 89th Cong., 1st Sess. 3562 (1965).

> This bill would assist these unsubsidized operators to upgrade their fleets without the vast outlays that new construction would entail.[22]

In utter disregard of the Act,[23] the Congressional intent, the Contract, the Hearing, and the findings of the presiding Administrative Law Judge,[24] the Court below put aside the standard of fairness and reasonableness and announced a new arbitrary concept to determine value in federal cases.[25]

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[22]H.R. Rep. No. 1652, U.S. Code, Cong. & Adm. News, 86th Cong., 2d Sess. 2648 (1960).

[23]*Cf.* Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 491, 95 L. Ed. 456, 71 S. Ct. 456 (1950); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-14, 28 L. Ed.2d 136, 91 S. Ct. 814 (1971).

[24]Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 493-97, 95 L. Ed. 456, 71 S. Ct. 456 (1950).

[25]*See* Moore-McCormack Lines, Inc. v. United States, 413 F.2d 568, 582 (Ct. Cl. 1969); Louisville Joint Stock Land Bank v. Radford, 74 F.2d 576, 582-83 (6 Cir. 1935).

CONCLUSION

This Court should review this case because it stands as precedent for a retreat from Wunderlich Act review in Government contract cases and is a matter of substantial public importance and concern. The Court of Claims' new doctrine of fair and reasonable value will apply to all federal cases and effectively eliminate this standard. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GERALD A. MALIA
C. MICHAEL TARONE
Ragan & Mason
900 17th Street, N.W.
Washington, D.C.

Attorneys for Petitioner

APPENDIX A

In the United States Court of Claims

No. 473-72

(Decided March 20, 1974)

SEA-LAND SERVICE, INC. v. THE UNITED STATES

Gerald A. Malia, attorney of record, for plaintiff. *Ragan & Mason*, of counsel.

Raymond B. Benzinger, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant. *William A. Mogel*, of counsel.

Before DURFEE, *Senior Judge*, SKELTON and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DURFEE, *Senior Judge*, delivered the opinion of the court:

Sea-Land Services, Inc., a Delaware corporation, petitions this court to set aside an adverse final opinion and order [1] of the Assistant Secretary of Commerce for Maritime Affairs [2] (the "Assistant Secretary" or "MARAD"). The dispute involves the exchange of three vessels owned by plaintiff in return for three vessels owned by defendant, pursuant to the parties' contract, under the authority of the Vessel Exchange Act.[3] Sections 1 and 2 of the Wunderlich Act [4] pro-

[1] U.S. Department of Commerce, Maritime Administration/Maritime Subsidy Board Docket No. CA-43.

[2] *ex officio*. Maritime Administrator, U.S. Department of Commerce.

[3] The Vessel Exchange Act, Pub. Law No. 86-575 (July 5, 1960), 74 Stat. 312, 46 U.S.C. § 1160(1) (1970), was an amendment to the Merchant Marine Act of 1936, 46 U.S.C. §§ 1101 *et. seq.*, (1970).

[4] 68 Stat. 81, 41 U.S.C. § 321-22 (1970).

vide the standard for judicial review. For the reasons hereinafter discussed, we conclude that the decision of the Assistant Secretary in this case was correct, that plaintiff's motion for summary judgment must be denied and that defendant's cross-motion for summary judgment must be granted.

I

On May 13, 1965, Sea-Land entered into Contract No. MA–3856 (the "Exchange Contract") with the United States for the exchange of three of its vessels, the CHATHAM, COLORADO and FANWOOD (the "exchange" or "traded-in" ships) for three Government-owned vessels, the ARIZPA, WACOSTA and WARRIOR (the "transfer" or "traded-out" ships). The ultimate issue in this case is whether the values assigned by the contracting officer to both the exchange and transfer ships were "fair and reasonable" as required by the Vessel Exchange Act, 46 U.S.C. § 1160(i)(2) (1970).

The transfer ships which were to be traded out to Sea-Land were to be converted into containerships and were therefore not immediately available for commercial operation. For that reason, the parties entered into Use Agreement Contract No. MA–3857, under which MARAD chartered the traded-in vessels back to plaintiff, permitting it to retain and operate those ships in United States foreign and domestic commerce until the traded-out vessels were converted into containerships. The Exchange Contract and the Use Agreement were executed simultaneously, on May 13, 1965, the date of exchange.

The vessels' service was not interrupted for drydocking and condition surveying; the ships were assigned the following "unadjusted fair and reasonable values" as of the date of exchange, based upon the findings of MARAD's Ship Valuation Committee:

Exchange Ships

CHATHAM	$468,000
COLORADO	453,750
FANWOOD	458,500
TOTAL	$1,380,250

Transfer Ships

ARIZPA	$444,250
WACOSTA	444,250
WARRIOR	453,750
TOTAL	$1,342,250

These values were agreed to by both parties and were embodied in Article 4 of the Exchange Contract.

The parties agreed in the Exchange Contract that Sea-Land would accept title to the transfer ships on an "as is, where is" basis, and that the "unadjusted" fair and reasonable values of the transfer ships would be their fair and reasonable values. In short, the values assigned to the traded-out vessels by MARAD's Ship Valuation Committee would be their final values for purposes of the vessel exchange.

On the other hand, the parties agreed for an adjustment to be made to the values the Ship Valuation Committee had assigned to the exchange vessels. The unadjusted values of the exchange vessels were to be reduced by the cost of in-class repairs found to be necessary when those ships were physically delivered to MARAD (hereinafter referred to as "date of redelivery") at the end of the use period. Article 3 of the Exchange Contract provides, in pertinent part:

> (b) The "fair and reasonable value" of an Exchange Ship means:
>
> (1) The unadjusted fair and reasonable value of the Exchange Ship as stated and agreed upon in Article 4(a) hereof
>
> * * * * *
>
> minus
>
> (3) The cost of in-class work necessary on the Exchange Ship, but not performed prior to delivery, as finally estimated by the Contracting Officer, based upon a physical survey of the Ship, taking into account the provisions of Article 7 of this Contract.
>
> * * * * *

The terms "in-class" and "in-class work" were defined in Article 3(c) and (d) of the Exchange Contract, as follows:

> (c) The term "in-class", as applied in this Contract to an Exchange Ship, means the condition of the Ship is such as to entitle it to: (1) the highest classification of the

American Bureau of Shipping for the specific type ship, and (2) valid Certificates of Inspection for compliance with the regulations of the United States Coast Guard, the United States Public Health Service, and the Federal Communications Commission.

(d) The term "in-class work," as applied in this Contract to an Exchange Ship means drydocking, surveying as required by the regulatory bodies, towage, and other work or services incidental to the survey, and all class requirements found during the course of the survey, as determined by the Contracting Officer based upon the delivery survey, taking into account the provisions of Article 7 of this Contract, but does not include the cost of the Shipowner's surveyors or agents, or any other overhead expense.

The parties agreed that Sea-Land would pay to MARAD the amount by which the values of the transfer ships traded out to Sea-Land exceeded the values of the exchange ships traded in, as determined by the contracting officer after delivery and survey of the exchange ships. Pending the determination of the class work found to be necessary during the course of the survey, Article 4(a) of the Exchange Contract provided for an "estimated" cost of necessary repairs of $40,000 per ship to be deducted from the unadjusted value of each exchange vessel, as required by MARAD regulations.[5] When the Exchange Contract was executed on the date of exchange Sea-Land paid to MARAD $82,000, representing the estimated amount by which the values of the traded-out vessels exceeded the values of the traded-in vessels.

The exchange ships, the CHATHAM, COLORADO and FANWOOD were drydocked, physically surveyed and redelivered to MARAD at the completion of the use (charter) period on April 7, April 22, and August 18, 1966, respectively. Based upon the survey reports, which were signed by representatives of both parties, the contracting officer determined the cost of in-class work required on the exchange vessels was $356,000, $255,000 and $250,000, respectively, for the CHATHAM, COLORADO and FANWOOD. These amounts were deducted from the unadjusted values, after making certain

[5] 46 C.F.R. § 375.3(k)(3) (1965).

other adjustments to those values required by the contract, to ascertain the fair and reasonable values of the exchange ships. This resulted in final adjusted fair and reasonable values as follows:

CHATHAM	$110,116.76
COLORADO	208,513.61
FANWOOD	206,715.33

The contracting officer concluded that Sea-Land owed the United States $816,904.30 less $82,000 paid by Sea-Land when it signed the Exchange Contract, representing the amount by which the total value of the traded-out ships exceeded the total value of the traded-in ships.

Sea-Land subsequently paid, under protest, the balance of $734,904.30, and appealed the contracting officer's final decision within the Maritime Administration,[6] as provided by the Disputes Clause (Article 16) of the Exchange Contract. An initial decision by the MARAD Chief Hearing Examiner,[7] to whom Sea-Land's appeal had been referred for an evidentiary hearing, recommended that Sea-Land be reimbursed in the full amount of $816,904.30 in order to perfect the vessel exchange. On December 7, 1972, the Assistant Secretary issued his final opinion and order affirming the decision of the contracting officer, rejecting the initial decision and recommendation of the Chief Hearing Examiner, and dismissing Sea-Land's appeal with prejudice. Sea-Land now seeks Wunderlich Act review of MARAD's final opinion and order.

MARAD's factual determinations are entitled to finality unless they are determined to be fraudulent, capricious, arbitrary, or so grossly erroneous as to imply bad faith, or are not supported by substantial evidence. 41 U.S.C. § 321; *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963); *Koppers Co.* v. *United States*, 186 Ct. Cl. 142, 405, F. 2d 554 (1968). We are not constrained, of course, by MARAD's determinations with respect to matters of law, and are free to reach our own conclusions. 41 U.S.C. § 322; *Northwestern Industrial Piping, Inc.* v. *United States*, 199 Ct. Cl. 540, 467 F. 2d 1308 (1972); *Maxwell Dynamometer Co.* v. *United*

[6] Maritime Subsidy Board Docket No. CA-43.
[7] Now entitled "Chief Administrative Law Judge."

States, 181 Ct. Cl. 607, 386 F. 2d 855 (1967); *Blount Bros. Const. Co.* v. *United States*, 171 Ct. Cl. 478, 346 F. 2d 962 (1965). We are mindful, however, that the construction given to the provisions of the Vessel Exchange Act by the Maritime Administration is entitled to great weight if reasonable. *United States* v. *American Trucking Assoc. Inc.*, 310 U.S. 534 (1940).

As previously noted, the ultimate question in the case is the fair and reasonable values of the transfer and exchange ships. The first disputed issue relevant to that question concerns the reduction of the unadjusted values assigned to the exchange ships by the cost of placing those vessels in class. Plaintiff maintains that MARAD erroneously interpreted pertinent provisions of the Vessel Exchange Act and the Exchange Contract relative to in-class repairs. A second disputed issue involves MARAD's interpretation of the statutory requirement that the fair and reasonable value of the vessels be determined "as of the date of the exchange." 46 U.S.C. § 1160(i)(2) (1970). Plaintiff contends that MARAD erred in failing to rule that the requirement is mandatory. A third disputed issue relates to whether the values of the exchange and transfer ships were required to be calculated "in the same manner," as provided by section 510(i)(2) of the Vessel Exchange Act. 46 U.S.C. § 1160(i)(2) (1970). Plaintiff urges us to hold erroneous MARAD's ruling that the valuations were determined in accordance with this provision of the statute.[8]

Defendant asserts a counterclaim in its answer to the petition demanding payment of $986,115, which claimed amount represents the cost of required class and other necessary re-

[8] Sea-Land also argues that MARAD erred in rejecting the initial decision of the Chief Hearing Examiner, which recommended that plaintiff be reimbursed the $816,904.30 previously paid to MARAD. Plaintiff does not contend that MARAD's failure to adopt that decision is error *per se;* rather, we understand it to be plaintiff's position that MARAD erred in not adopting that decision because the Chief Examiner's conclusion as to the fair and reasonable value of the vessels was correct, and his interpretation of the relevant statute, regulations and contract provisions was legally sound.

We are engaged, of course, only to review the administrative decision, *i.e.*, the final opinion and order of the Maritime Administration, under the Tucker Act, 28 U.S.C. § 1491, in accordance with Wunderlich Act standards, 41 U.S.C. §§ 321–22. The correctness of the Chief Hearing Examiner's findings and legal theories, to the extent they are now urged by plaintiff, will be considered in the course of this opinion.

pairs for which Sea-Land is allegedly liable under Use Agreement Contract No. MA-3857. Defendant subsequently moved to suspend proceedings on the counterclaim until final determination of identical issues involved in a proceeding before the Maritime Subsidy Board. Sea-Land has moved to dismiss the counterclaim.

These issues relative to the main claim and the counterclaim are considered in turn.

II

MARAD reduced the unadjusted values of the exchange ships by the cost of in-class repairs as determined by the contracting officer upon drydocking, physical survey and redelivery. Sea-Land first of all asks us to assign error to that adjustment in values. The parties specifically disagree as to the meaning of the statutory language which requires the Secretary of Commerce, in determining the fair and reasonable values of the traded-in and traded-out vessels, to consider "* * * the cost of placing the vessels in class with respect to hull and machinery * * *." 46 U.S.C. § 1160(i)(3) (1970).[9]

At 46 U.S.C. § 1160(i)(2), the Vessel Exchange Act provides as follows:

> (2) The fair and reasonable value of the traded-in and traded-out vessels shall be determined as of the date of the exchange pursuant to subsection (d) of this section. * * *

Subsection (d) of section 510 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1160(d), provides that such value to be determined shall be based upon a consideration of (1) the scrap value in American and foreign markets, (2) the depreciated value, and (3) the market value for operation in world trade or in foreign or domestic trade of the United States.

The Vessel Exchange Act next provides, at 46 U.S.C. § 1160(i)(3):

> (3) In determining said fair and reasonable value the Secretary shall consider *the cost of placing the ves-*

[9] We here consider the meaning of the statutory terms. The reasons why the parties agreed not to consider the cost of placing the *transfer* vessels in-class is discussed *infra*.

> *sels in class with respect to hull and machinery*, and, with respect to any traded-out vessels of the military type, the cost of reconverting and restoring such vessels for normal operation in commercial service. * * * In determining the value of the traded-in vessel or vessels the Secretary may take into consideration the cost to the owner of compliance with subparagraph (8), clauses (A) and (B), of this subsection. [Emphasis supplied]

Subparagraph (8), clauses (A) and (B) of subsection (i) refers to the expense incurred by the owner of the traded-in vessel for deactivating and preparing the traded-in ship for storage and layup and for delivery at a location designated by the Secretary of Commerce.

The Act did not define the terms "the cost of placing the vessels in class with respect to hull and machinery."[10] MARAD's regulations[11] defined the terms in language similar to that included by the parties in the Exchange Contract:

> "In class with respect to hull and machinery" * * * shall * * * encompass all work necessary to place a vessel in such condition as will entitle it to:
>
> (1) The highest classification of the American Bureau of Shipping [ABS] for the specific type of vessel, and
>
> (2) Valid Certificates of Inspection for compliance with the regulations of the United States Coast Guard, the United States Public Health Service [PHS], and the Federal Communications Commission [FCC].

The operating condition of the U.S.-flag vessels is regulated primarily by the ABS regarding classification of U.S. vessels (*see* 46 U.S.C. § 881), by the United States Coast Guard regarding safety and navigation (*see* 14 U.S.C. § 2), by the PHS regarding health (*see* 42 U.S.C. § 269), and by the FCC regarding communications (*see* 47 U.S.C. §§ 351–384). The ABS, a private organization, issues a classification every four or five years for cargo ships operating in U.S. foreign ocean commerce. For such classification ABS requires after the initial ship construction a special periodical survey every four years and compliance with repair items found

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[10] The parties are unable to cite us to any testimony at the legislative hearings which would aid us in unlocking the meaning of these terms, and our own investigation of the legislative history has led us to none.

[11] 46 C.F.R. § 375.2(d) (1965).

as a result of the survey. A fifth year of grace before requiring reclassification may be permitted depending on the condition of the ship and the report of its last annual survey. The ships usually do not lose their classification while complying with repair items and may only lose classification by being stricken from the ABS record. The other agencies, the Coast Guard, PHS and FCC, issue certificates of inspection annually or biannually for compliance with their regulations which, if withdrawn or not issued, restrict operation of such vessels.

The traded-in vessels actually possessed the highest ABS classification at the time they were redelivered to MARAD; each of the three ships were generally in the final months of the fifth grace year. They also possessed valid certificates of inspection from the Coast Guard, PHS and FCC. Nonetheless, the reports based upon the physical survey of the ships at the time of redelivery indicated numerous class requirement repair items for each of the vessels, including some "presently outstanding" repair items under ABS requirements.[12]

Plaintiff argues as follows: that the statute clearly provides that the "class" allowance authorized is for *placing* the vessel in class, not for *retaining* the vessel in class or for *prolonging* the "in-class" status for some future period of time; that the requirement only applies to instances when vessels are not in-class (*i.e.*, when they do not possess ABS classification and valid regulatory certificates), and since the CHATHAM, COLORADO and FANWOOD all possessed ABS classification and valid regulatory certificates on the date of exchange and when redelivered, the requirement did not apply to them; that Sea-Land's liability (for which it assumes responsibility) is limited to one "outstanding" class recommendation on the CHATHAM.

The Government asks us to affirm MARAD's final opinion and order by interpreting the statutory language "the cost of placing the vessels in class" to mean the cost of all class work necessary to place the vessels in condition, as determined at the date of redelivery, to entitle it to the highest ABS classification and valid certificates from the Coast Guard, PHS and FCC.

[12] "presently outstanding" repair items refers to those items already determined by the ABS to be needed but allowed to be deferred.

It is a familiar policy in the construction of statutes that the meaning of particular terms used is to be derived not only by consideration of the words themselves, but also of the context, the purpose of the law, and the circumstances under which the terms were used. *Puerto Rico* v. *The Shell Co. (P.R.), Ltd.*, 302 U.S. 253 (1937). This rule serves as a guide to direct our inquiry into legislative intent.

The Vessel Exchange Act amended the Merchant Marine Act of 1936 to authorize the exchange of certain privately-owned vessels for more modern and efficient vessels owned by the United States. The primary purpose of the legislation, as stated therein, was "* * * to improve the type and suitability of vessels operating in the domestic and foreign commerce of the United States, and to further the policies of this Act."[13]

The statute sets forth the "conditions" to which the contemplated exchanges are subject in nine subparagraphs. Subparagraph (2) provides for the determination of the fair and reasonable value of the traded-in and traded-out vessels, and subparagraph (3) provide that "[*i*]*n determining said fair and reasonable value* the Secretary shall consider the cost of placing the vessels in class * * *." [Emphasis supplied.] The statute emphatically states the reason for inclusion of the provision relative to in-class repairs—the costs of such repairs are to be a factor in the determination of a vessel's fair and reasonable value. The construction we give to the statutory terms must be consistent with, and in furtherance of, the purpose for which they were included in the statute.

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[13] 46 U.S.C. § 1160(1). The purpose for enactment of the original Merchant Marine Act was set forth in its "Declaration of Policy," 46 U.S.C. § 1101, as follows:

"It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

We conclude that Congress intended the phrase "the cost of placing the vessels in class" to mean the cost of all class requirement work necessary, as determined at the time of the exchange, to put the vessels in a condition which would *then* entitle them to the highest ABS classification and valid certificates from the Coast Guard, PHS and FCC.[14] Such an interpretation is consistent with the stated purpose of considering the cost of in-class repairs—the determination of a ship's value—because it takes account of the actual condition of the vessel, the only true measure of its value. The standard against which the actual condition of a vessel is measured for the purpose of determining its value is the condition which would entitle it to the highest ABS classification and valid certificates from the Coast Guard, PHS and FCC.

Sea-Land's contention that the "in-class"provision of the statute is applicable only in instances when a vessel does not possess ABS classification or valid certificates from the regulatory agencies must be rejected. Such an interpretation of the statutory terms fails to consider them in light of the purpose for considering the cost of in-class repairs—the determination of fair and reasonable values. No measure of value can be derived from the fact that a vessel merely possesses ABS classification or valid certificates at the time of the exchange. ABS classification surveys are conducted only once in four or five years. A vessel's condition with respect to in-class requirements—and hence its value—might be quite different in its fifth year of operation after ABS survey and classification than what it was in its first year of operation after survey and classification. As noted earlier, all three of the exchange vessels involved in this case were in their fifth (grace) year of operation. To accept Sea-Land's contention that the "in-class" provision of the statute applied only when a vessel had never been in class, or had lost its classification, would emasculate the statutory condition that vessels be exchanged on the basis of their "fair and reasonable values." Additionally, such an interpretation would render the "in-class" provision of the statute insignificant and practically meaningless, especially in light of MARAD's finding that it

[14] The relevant point in time under this exchange contract for determination of class work necessary on the exchange ships was the date of redelivery rather than the date of exchange.

would only be in the "rarest of instances" when a vessel lost its ABS classification or certificates of inspection.[15]

Plaintiff attempts to rely upon *A. H. Bull Steamship Co.* v. *United States*, 123 Ct. Cl. 520, 108 F. Supp. 95 (1952) and upon *Nautilus Shipping Corporation* v. *United States*, 141 Ct. Cl. 391, 158 F. Supp. 353 (1958) in support of its interpretation of the "in-class" provision of the Vessel Exchange Act. Both *Bull* and *Nautilus* concerned the Merchant Ship Sales Act of 1946, 60 Stat. 41 *as amended* 62 Stat. 1199, 46 U.S.C. § 864a (1970), which required the U.S. Maritime Commission, predecessor to the Maritime Administration, to adjust the statutory sales price of a vessel by deducting the amount estimated by the Commission for "putting such vessels in class." Both cases are inapposite to the issue in the case at bar. If *Bull* and *Nautilus* had held that the "in-class" requirement of the Merchant Ship Sales Act did not apply when a ship possessed valid classification certificates at the date of sale, then those cases might be relevant, by way of analogy, to aid our interpretation of the "in-class" provision of the Vessel Exchange Act. Those cases do not so hold. Neither case mentioned whether or not the vessels involved in the sales possessed valid classification certificates at the times the adjustments to the statutory sales prices were made.

Finally, plaintiff argues that the Exchange Contract does not require adjustment of the unadjusted values of the exchange ships by the cost of all "in-class" work found to be necessary during the course of the survey required at the time of redelivery, but rather that the contract only requires that the cost of "outstanding" class requirements be considered. Plaintiff also maintains that the "in-class" provisions of the contract are ambiguous, and that they should therefore be construed against their drafter, the Government.

We do not find the Exchange Contract ambiguous; on the contrary, the contract sets out in clear and cogent terms what was contemplated by the parties. Article 3(b)(3) of the con-

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[15] This finding is entitled to finality. 41 U.S.C. § 321; *United States* v. *Carlo Bianchi & Co., supra*. Plaintiff has not convinced us that it was arbitrary, capricious or unsupported by the evidence merely by citing us to *Great American Ins. Co.* v. *Bureau Veritas*, 338 F. Supp. 999, 1003 (S.D.N.Y. 1972) and to *United Distillers of America, Inc* v. *The T/S Ionian Pioneer*, 130 F. Supp. 647, 649 (E.D. La. 1955), *aff'd* 236 F. 2d 78 (5th Cir. 1956), in which cases it was mentioned that the ships involved therein had lost classification.

tract provides that in determining the fair and reasonable values of the exchange ships the unadjusted values shall be reduced by—

> (3) The cost of in-class work necessary on the Exchange Ship * * * as finally estimated by the Contracting Officer, based upon a physical survey of the Ship, taking into account the provisions of Article 7 of this Contract.

Article 3(d) of the contract provides that the definition of the term "in-class" work includes "all class requirements found during the course of the survey," as determined by the contracting officer, taking into consideration Article 7 of the contract. Article 7(c) of the contract provides in pertinent part:

> * * * Based upon the survey report there shall be established a listing of in-class work necessary on the Exchange Ship which is not to be performed prior to delivery for the purpose of making the determination required under Article 3(b)(3) of this contract.

The Exchange Contract clearly requires the unadjusted values of the exchange ships to be reduced by the cost of the class requirements found to exist at the time the vessels were surveyed. Inclusion of the above-quoted provisions in the Exchange Contract would be inexplicable if the parties understood the "in-class" provisions of the statute and the Exchange Contract to apply only when a vessel did not possess valid ABS classification and certificates of inspection. The short answer to plaintiff's contention that the contract required only the cost of "outstanding" class requirements to be considered in determining the fair and reasonable values of the vessels is that the contract expressly provides otherwise. The contract states that the survey report would include "*all* class requirements found during the course of the survey" and that the cost of *all* such class requirements would be considered in adjusting the fair and reasonable values of the exchange vessels. Had the parties intended only that the cost of "outstanding" class requirements be considered, they would have so provided.

Additionally, plaintiff commits the same error in interpreting the "in-class" provisions of the Exchange Contract as it does in interpreting the "in-class" provisions of the Vessel

Exchange Act. The true meaning of the terms cannot be determined out of context and without regard to their purpose. The "in-class" provisions were included in the Exchange Contract so that the condition and ultimately the value of the vessels could be determined. Plaintiff's contended-for interpretation of the provisions—that only the cost of "outstanding" class requirements from a prior ABS survey be considered in adjusting the fair and reasonable values of the exchange ships—is inconsistent with the purpose for their inclusion in the contract.

The exchange vessels were drydocked and jointly surveyed by the parties in accordance with Article 7 of the Exchange Contract. Representatives of Sea-Land signed without exception or reservation each survey report with attached lists of deferred class work items. The contracting officer estimated the costs of deferred class work on the CHATHAM, COLORADO and FANWOOD as $356,000, $255,000 and $260,000, respectively, and these amounts were sustained on appeal. Plaintiff has failed to show that these factual findings are arbitrary, capricious or unsupported by substantial evidence; they are therefore entitled to finality and binding upon this court. 41 U.S.C. § 321; *Bianchi, supra.*

III

Sea-Land and the Government agreed to delay the final determination of the fair and reasonable values of the exchange vessels until redelivery of those ships after the period of charter under the Use Agreement. The parties further agreed to the "unadjusted" values assigned to those ships by MARAD's Ship Valuation Committee which, as previously noted, were to be adjusted by the cost of in-class repairs found to exist during the course of the parties' joint survey upon redelivery. Sea-Land now contends that this arrangement was not in compliance with the Vessel Exchange Act, which calls for the determination of the values of the traded-in vessels "as of the date of the exchange." 46 U.S.C. § 1160(i)(2) (1970). Plaintiff argues that the statutory terms must be applied literally and mandatorily.[18]

[18] Both parties agree that the "date of exchange" is May 13, 1965, the day on which the Exchange Contract was executed.

The actual question to be decided is whether the arrangement contracted for by the parties was legally invalid and in derogation of the statutory provision that the ships' fair and reasonable values shall be determined "as of the date of exchange." We conclude that the adjustments made to the values of the exchange ships upon redelivery were not precluded by the statute.

In the first place, the statutorily prescribed requirement was complied with because the exchange vessels *were* valued as of the date of the exchange. It is true, the valuation determination was fixed on an "unadjusted" basis as of that time, but the determination of the final values was deferred, as found by the Assistant Secretary, "largely at Sea-Land's behest so as to afford it continued use of the traded-in vessels." The true condition of the exchange vessels—and therefore their final values—could not be determined until they were free of cargo, drydocked and surveyed. Since the exchange vessels were at sea when plaintiff applied to MARAD to trade them in, and since the traded-out ships were not then available for Sea-Land's use, Sea-Land requested postponement of drydocking and surveying, thereby delaying a finalized determination of the ships' values.

Plaintiff asks us to apply the statutory terms "as of the date of exchange" literally so as to preclude any and all adjustments to a ship's value subsequent to the date of exchange valuation. This we cannot do because such an unqualified literal application of the statutory provision would defeat the general purpose and policy of the Vessel Exchange Act. Construction of Statutory terms must be consistent with the purpose of the statute as a whole so as to advance and effectuate the legislative design. *United States* v. *American Trucking Assoc.*, 310 U.S. 534 (1940), *rehearing denied*, 311 U.S. 724 (1940).

The Assistant Secretary concluded that if a final and conclusive trade-in allowance must be established as of the date of an exchange contract, no contracts could be executed until after the traded-in vessels were drydocked and surveyed and deductions for the cost of placing the vessels in class were made. Such a procedure would vitiate the benefits to those shipowners wishing to upgrade their fleets but unable or unwilling to interrupt their commercial service at the date of

exchange. This consequence of plaintiff's interpretation of the statutory language in its literal sense would clearly be inconsistent with the purpose and policy of the Vessel Exchange Act.

The Act was passed to improve the type and suitability of U.S.-flag vessels operating in the domestic and foreign commerce of the United States, and to further the policies of the 1936 Merchant Marine Act,[17] including fostering the development and maintenance of a a merchant marine sufficient to carry all U.S. domestic and a substantial portion of U.S. foreign water-borne commerce. The reasons why the parties' arrangement to defer a final valuation on the exchange ships was consistent with the purposes of the Act, and why plaintiff's unimaginative and literal interpretation of the "date of exchange" provision would frustrate the purposes of the Act, were succinctly stated by the Assistant Secretary in his final opinion, at 13–14:

> * * * [The Vessel Exchange Act's] legislative purposes were furthered by the deferred valuation determination since Sea-Land's merchant fleet services continued to operate uninterrupted during the period of reconstruction of the traded-out vessels, thereby providing additional carriage of U.S. foreign waterborne commerce. Contrariwise, an immediate survey would have interrupted Sea-Land's commercial service, diminished U.S.-flag waterborne service until the traded-out vessels were reconstructed, and placed an unanticipated burden upon the owner's opportunity under the Exchange Act to upgrade its fleet.

Courts have not refused to qualify the apparent absolutes of a statutory provision when the harsh and inflexible consequences of literalism would frustrate the patent purpose of the whole act. *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892); *Markham* v. *Cabell*, 326 U.S. 404 (1945). We conclude that Congress could not have intended the "date of exchange" valuation requirement to be so inflexibly and mechanically applied as to defeat the policy and purpose of the Vessel Exchange Act.

It is important to again note that the construction given a statute by the officers or agency charged with its admin-

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[17] *See* note 13, *supra*.

istration is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1 (1965). The Maritime Administration, by the promulgation of General Order 92, authorized the use of exchange vessels by shipowners under the terms and conditions of use agreements while transfer vessels were being readied for normal operation.[18] The regulations further allowed for adjustment to the unadjusted fair and reasonable value of exchange ships (determined at the date of exchange) by the cost of in-class repairs needed, as determined by survey at the time of actual delivery.[19] MARAD's flexible interpretation of the statutory terms, as implemented through its regulations, to allow the subsequent adjustment to the "date of exchange" value of a vessel which is not available for survey on the date of exchange, is a reasonable interpretation consistent with the Congressional purpose underlying the statute.

We do not read out of the Vessel Exchange Act the requirement that a ship's fair and reasonable value shall be determined as of the date of exchange. That requirement still stands. We hold only that the requirement is not so inflexible as to preclude adjustment of a ship's fair and reasonable value, determined as of the date of exchange, by the cost of placing the vessel in class, as determined at some later date.

Finally, Sea-Land contends that even assuming *arguendo* that MARAD was correct in "valuing the Exchange Ships as of the date of 'redelivery' in 1966,"[20] MARAD erred in rejecting evidence that the value of C-2 vessels—and therefore the value of the exchange ships—increased during the period between the date of exchange and the date of redelivery in 1966. Plaintiff mistakes what occurred when it argues that the exchange ships were "valued" as of the date of redelivery in 1966. They were "valued" by the Ship Valuation Committee as of the date of exchange, as required by the statute, with in-class "adjustments" to be made as of the date of redelivery. Title to the exchange and transfer ships was transferred as of the date of exchange, and defendant was the owner of the CHATHAM, COLORADO and FANWOOD during the period of claimed increase in market value. Clearly, any increase in the market value of the

[18] 46 C.F.R. § 375.3(o) (1965).
[19] 46 C.F.R. § 375.3(k)(3) (1965).
[20] Petition, at 17.

exchange ships after the date of exchange ran to the benefit of the Government, just as any increase in the market value of the transfer ships after the date of exchange ran to the benefit of Sea-Land.

IV

While the Exchange Contract provided for the unadjusted values of the exchange ships to be reduced by the cost of in-class repairs found to be necessary on the redelivery date, the transfer ships were to be accepted by Sea-Land on an "as is, where is" basis, their unadjusted fair and reasonable values as found by MARAD's Ship Valuation Committee to be final. Plaintiff now asks us to set aside the parties' agreed-to transaction, claiming that it violates section 510(i)(2) of the Act, which provides that the value of the traded-in and traded-out vessels shall be calculated "in the same manner." 46 U.S.C. § 1160(i)(2) (1970).

This provision was inserted as an addition to the original Vessel Exchange Act when the Act was extended on October 10, 1965. It thus became effective five months subsequent to the May 13, 1965 exchange involved in this suit. Sea-Land argues for a retroactive application of this amendment to the May 13, 1965 exchange in that it "effectuates, rather than changes, the basic policy" of the law. The governing rule, however, is that Congress is presumed to have intended statutes or amendments to operate prospectively unless there is clear statutory expression or legislative history to the contrary. *Brewster* v. *Gage*, 280 U.S. 327 (1930); *Cameron* v. *United States*, 231 U.S. 710 (1914). The language of the amendment to the Act does not evidence that Congress intended retroactive application, nor is such an intention manifest in the legislative history.

There is, in any event, a logical explanation to justify the different treatment given the valuation of the transfer and exchange ships. A complete understanding of the transaction entered into under the Exchange Contract requires that account be taken of a previous vessel exchange between the parties. The prior exchange occurred on November 10, 1964. Under Exchange Contract No. MA–3740 McLean Industries, Inc. traded in six vessels to the Government including the ARIZPA, WACOSTA and WARRIOR in exchange for six

vessels traded out by the Government to McLean's subsidiary, Waterman Steamship Co. The traded-out ships were to be converted to containerships, and were therefore not immediately available for commercial operation. Accordingly, the parties simultaneously executed Use Agreement No. MA–3741 under which the Government agreed to let Waterman use the six traded-in vessels in its service until the traded-out vessels could be readied for operation. Litton Industries Leasing Corporation was to do the conversions, and thereafter the traded-out ships were to be chartered by Waterman to McLean's other subsidiary, Sea-Land, for operation in the latter's service.

Some time after McLean/Waterman had traded in the ARIZPA, WACOSTA and WARRIOR, McLean decided that their hulls and configurations would be better for conversion to containerships than the CHATHAM, COLORADO and FANWOOD in Sea-Land's fleet. McLean therefore sought to acquire back these three vessels through another ship exchange, the exchange presently in dispute. Since Waterman had authority to operate the three vessels under an unexpired Use Agreement, McLean, Sea-Land, Waterman and Litton proposed that Waterman forego further operation of the three vessels under its Use Agreement and redeliver the same at sea; that the Government accept them "as is, where is," and transfer title to the vessels simultaneously to Sea-Land; that Sea-Land accept simultaneously said vessels, "as is, where is" at sea.

No further adjustments in valuation were made to the transfer ships under Exchange Contract No. MA–3856, and McLean/Waterman received the unadjusted valuation of said vessels without further adjustment under Exchange Contract No. MA–3740. The arrangement enabled McLean and its subsidiaries to engage in these vessel exchanges, and at the same time left McLean's service uninterrupted. McLean was clearly the real party in interest under both exchange contracts. No purpose would have been served by drydocking and surveying the transfer ships to estimate the cost of in-class repairs. Any adjustment for class work to the values of the ARIZPA, WACOSTA and WARRIOR when those were traded in under Exchange Contract No. MA–3740 would have been identical to any adjustments for class work to those

same vessels when they were traded out under Exchange Contract No. MA–3856. The parties took this offset into consideration and simply omitted a procedure which would have caused unnecessary delay and expenditure.

V

Sea-Land finally argues that MARAD's demand for payment of $734,904.30 as a condition to the processing of certain other unrelated contracts, and that MARAD's retention of that amount (together with the retention of the $82,000 paid to MARAD at the date of exchange) while delaying decision herein until December 7, 1972, are unlawful. Plaintiff offers no evidence or authority to support its assertion that the processing of other contracts was conditioned upon payment under this contract, or that MARAD in any way delayed its decision in the instant case. Plaintiff agreed under Article 2(b) of the Exchange Contract to pay, within ten days of the contracting officer's determination, the amount by which the values of the transfer ships exceeded the values of the exchange ships. Plaintiff further agreed under the Disputes Clause (Article 16) to proceed diligently with the performance of its contractual responsibilities and in accordance with the contracting officer's decision pending final decision of any dispute. Plaintiff is bound by these terms.

VI

Defendant interposes a counterclaim in the amount of $986,155 pursuant to Rule 40(a). The claimed amount represents plaintiff's alleged liability under Use Agreement Contract No. MA–3857 for the cost of "in-class" repairs and all repairs necessary to maintain the exchange ships in a "good state of repair and in efficient operating condition and in accordance with good commercial maintenance practices." The Government doubly protected itself by including provisions rendering Sea-Land responsible for the cost of in-class work on the exchange vessels in both the Exchange Contract and the Use Agreement. Any recovery on the counterclaim under the Use Agreement would therefore be reduced by Sea-Land's liability for "in-class" repairs under the Exchange Contract. This means, in effect, that the actual amount sought under defendant's counterclaim is $115,155.

On December 20, 1972, the contracting officer rendered a final decision finding that plaintiff owed the Government $986,155 as the cost of repairs that should have been performed by and at the expense of Sea-Land under Clause 6 of the Use Agreement. He credited Sea-Land with $871,000 for sums already paid for necessary class repairs under the Exchange Contract, and accordingly made a demand on Sea-Land for the balance amount of $115,155. On January 9, 1973 plaintiff appealed that decision, and on July 16, 1973, plaintiff's administrative appeal was docketed (Maritime Subsidy Board No. CA-80) for oral hearing and recommended decision. Thereafter, on July 24, 1973, defendant moved to suspend proceedings on its counterclaim until completion of the administrative proceedings and issuance of a final determination of these issues by the agency. Plaintiff opposes suspension of proceedings on defendant's counterclaim and moves for its dismissal. The parties have advised us since oral argument that proceedings before the Maritime Subsidy Board on the issue of Sea-Land's liability for repairs under the Use Agreement have been stayed pending our determination of defendant's counterclaim.

Plaintiff grounds its motion to dismiss the counterclaim on the relevant statute of limitations, 28 U.S.C. § 2415(a) (1970), which provides in part:

> (a) * * * every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *.

Assuming the counterclaim would be time-barred because it was brought more than six years after the cause of action accrued, the limitations provision is rendered inapplicable, in any event, by virtue of 28 U.S.C. § 2415(f), which provides, in pertinent part:

> (f) The provisions of this section shall not prevent the assertion, in an action against the United States * * * of any claim of the United States * * * against an opposing party * * * that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. * * *

Plaintiff argues that the facts of the case do not support a finding that defendant's counterclaim arises out of the same

"transaction or occurrence" as the main claim. We disagree. Plaintiff points out that the main claim relates to its liability under the Exchange Contract whereas the Government's counterclaim relates to its liability under the Use Agreement. This factor is hardly dispositive of the issue. Two claims arise out of the same "transaction or occurrence" if they are "logically related." *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968 (2d Cir. 1944). Although the parties entered into two separate contracts—the Exchange Contract for the swap of the traded-in and traded-out vessels, and the Use Agreement for the charter of the traded-in vessels to Sea-Land while the traded-out vessels were being converted into containerships—they engaged in one single transaction. The two contracts involved the same ships, they were executed on the same day, and they incorporated each other by reference. The joint survey of the exchange ships conducted by the parties at the termination of the use period serves as the basis for Sea-Land's repair obligations under both the Exchange Contract and the Use Agreement. The charter of the exchange vessels to Sea-Land under the Use Agreement was the event that deferred final valuation under the Exchange Contract. The facts and circumstances of the case clearly support a finding that defendant's counterclaim arises out of the same "transaction or occurrence" that is the subject matter of plaintiff's main claim. Accordingly, the counterclaim is not time-barred by the provisions of 28 U.S.C. § 2415.

Whether defendant unreasonably delayed in presenting its claim to Sea-Land for the costs of repair obligations under the Use Agreement is yet another matter. It is not apparent from the record before us why the contracting officer's final decision regarding Sea-Land's repair obligations under the Use Agreement was not issued until January 20, 1972, whether this delay was reasonable under the circumstances of the case, or whether the delay was in any way prejudicial to plaintiff. These matters are now before the Maritime Subsidy Board on plaintiff's appeal of the contracting officer's final decision. The administrative agency is the appropriate forum for consideration of these matters in the first instance. *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

Defendant filed its counterclaim pursuant to Rule 40(a),

which requires inclusion in the answer of any claim defendant has against plaintiff arising out of the transaction or occurrence that is the subject matter of the petition. The compulsory counterclaim rule was designed to prevent multiplicity of actions, and to achieve resolution in a single lawsuit of all disputes arising out of common matters. *Southern Construction Co. Inc.* v. *Pickard*, 371 U.S. 57 (1962). The issues raised by defendant's counterclaim should not be considered here now, however, because they are properly and necessarily before the Administrative Agency. *Grace, supra.* It is apparent that defendant filed its counterclaim herein only to protect against a finding by the Maritime Administration that the issues relative to Sea-Land's liability for repairs under the Use Agreement involve a "breach of contract" over which it lacks jurisdiction.

Accordingly, in order to give effect to the policy underlying our compulsory counterclaim rule, and to preserve defendant's rights in the event the Maritime Administration determines that the issues in plaintiff's administrative appeal involve a "breach of contract" over which it lacks jurisdiction, proceedings on defendant's counterclaim will be suspended.

CONCLUSION

For all the foregoing reasons, the fair and reasonable values of the traded-in and traded-out vessels were those found by the Assistant Secretary, as determined by the Contracting Officer. The decision of the Maritime Administration is supported by substantial evidence, is not arbitrary or capricious, and is not based upon errors of law. It is therefore, by Wunderlich Act standards, binding here. Accordingly, plaintiff is not entitled to recover on its claim. Defendant's cross-motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. Plaintiff's motion to dismiss the counterclaim is denied. Proceedings on the counterclaim will be suspended for a period of six months to await the conclusion of proceedings between the parties pending before the Maritime Administration. Defendant's counsel is hereby designated reporting attorney responsible for advising the court, at intervals of 90 days or less, of the status of the proceedings before the Maritime Administration.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX B

SERVED
December 7, 1972
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

DOCKET NO. CA-43

SEA-LAND SERVICE, INC.

In the matter of the appeal of Sea-Land Service, Inc., from the decision of the Contracting Officer dated August 24, 1967, determing the fair and reasonable value of the exchange ships, CHATHAM, COLORADO and FANWOOD, and the transfer ships ARIZPA, WACOSTA and WARRIOR, pursuant to Contract No. MA-3856.

FINAL OPINION AND ORDER OF THE ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS EX OFFICIO MARITIME ADMINISTRATOR

Served Upon:

Gerald A. Malia, Esq., Ragan & Mason, 900 - 17th Street, N.W., Washington, D.C. 20006

John B. Beach, Esq., Staff Counsel, Maritime Administration, Washington, D.C. 20235

I.

INTRODUCTION

The issue before me is the "fair and reasonable" value of the three vessels SSs CHATHAM, COLORADO and FANWOOD traded in by Sea-Land Service, Inc. (Sea-Land), and the three vessels the SSs ARIZPA, WACOSTA and WARRIOR traded out by the Maritime Administration (MarAd) pursuant to Exchange Contract MA–3856 (Exchange Contract) executed on May 13, 1965, as authorized by the Vessel Exchange Act (Exchange Act).[1]

The Contracting Officer under the Exchange Contract in a Final Decision issued August 24, 1967, held Sea-Land liable to the Government for $816,904.30 – the balance of excess value of the vessels traded out (transfer vessels) over the value of the vessels traded in (exchange vessels). Sea-Land paid on signing the Exchange Contract $82,000 for the higher values then assigned to the traded-out vessels. It subsequently paid, under protest, the balance of $734,904.30. Sea-Land appealed the Contracting Officer's Final Decision to the Maritime Administrator[2] as provided by the Disputes

[1] The Vessel Exchange Act, Public Law No. 86-575, 74 Stat. 312 (July 5, 1960), was an amendment, Section 510(i), to the Merchant Marine Act, 1936, as amended. (1936 Act)

[2] The Disputes Clause under the Exchange Contract provides that appeals from the Final Decision of the Contracting Officer are to the Maritime Administrator. Section 42 of Public Law No. 91-469 in amending the Merchant Marine Act, 1936, authorized an Assistant Secretary of Commerce for Maritime Affairs and Section 38 of Public Law No. 91-469 provided that "The Assistant Secretary of Commerce for Maritime Affairs shall ex officio be the [Maritime] Administrator." On October 21, 1970, the Secretary of Commerce delegated his authority under the Vessel Exchange Act to the Assistant Secretary of Commerce for Maritime Affairs. Section 3 of Department Organization Order 10-8, 36 F.R. 1223.

Clause (Article 16) of the Exchange Contract. On September 8, 1967, Sea-Land's appeal was referred by the Acting Maritime Administrator to the Chief Examiner Paul N. Pfeiffer (now entitled Chief Administrative Law Judge)[3] for hearing as the Administrator's Representative. On March 5, 1971, after an evidentiary hearing, the Chief Judge served an Initial Decision recommending that Sea-Land be reimbursed the $816,904.30 paid to perfect the May 13, 1965 vessel exchange and that Sea-Land's liability under the maintenance provision of a Use Agreement (MA-3857), executed at the time of the May 13, 1965 vessel exchange, be set down for appropriate administrative or legal proceedings as soon as practical. Extensive exceptions to the Initial Decision were filed by Staff Counsel. Sea-Land filed a reply to those exceptions. On May 6, 1971, the Chief Judge certified the record in this proceeding to the Officer of Secretary, MarAd.

After a thorough review of the record and after much careful deliberation of the various issues raised, I affirm the Contracting Officer's August 24, 1967 Final Decision and dismiss Sea-Land's appeal with prejudice.

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[3] On August 19, 1972, the U.S. Civil Service Commission, upon publication in the Federal Register (37 F.R. 16787), changed the title "Hearing Examiner" as used in Subpart B – Appointment, Pay, and Removal of Hearing Examiners of Part 930 of Title V of the Code of Federal Regulations to "Administrative Law Judge."

II.

BACKGROUND

A. Pertinent Statutory Provisions

The "fair and reasonable" values of the traded-in and traded-out vessels under the Exchange Contract are determined by the Vessel Exchange Act, MarAd regulations implementing that Act and the provisions of the Exchange Contract. The Vessel Exchange Act on the date of execution of the Exchange Contract on May 13, 1965 provided in pertinent part as follows:

> "The fair and reasonable value of the traded-in and traded-out vessels shall be determined, as of the date of the exchange, pursuant to subsection (d) of this section [510].* * * In determining said fair and reasonable value the Secretary shall consider the cost of placing the vessels in class with respect to hull and machinery. . . ."

Section 510(d) provided as relevant that a determination of the fair and reasonable value of an obsolete vessel shall consider the scrap value both in domestic and foreign markets, the depreciated value based on a twenty year life, and the market value for operation in the world trade or in the foreign or domestic trade of the United States. On October 10, 1965, after the Exchange Contract was executed but before the traded-in vessels were redelivered,[4] the Vessel Exchange Act was extended and amended with the following relevant addition:

> "The value of the vessel when traded out shall be calculated in the same manner as its value was

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[4] The first "delivery" was a constructive one at the time the Government acquired title; "redelivery" refers to physical delivery or constructive delivery with simultaneous transfer of title by the Government to another.

determined when it was traded in. . . . In each exchange under this subsection, the value of the vessel traded-in, unless based on scrap value, and the value of the vessel traded-out, shall be calculated in the same manner."

B. Pertinent Regulatory and Contractual Provisions

Regulations were issued implementing these provisions of the Vessel Exchange Act by the Maritime Administrator in Administrator's Order 197, November 11, 1960, Administrator's Order 197 (Amended), December 4, 1961, General Order 92, March 1, 1962, 27 F.R. 2011, 46 CFR, Part 375. These regulations, among other things, provided that the "fair and reasonable value" of the traded-in and traded-out vessels is the value after final determinations are made regarding any "adjustments" permitted by contract. The term "unadjusted value" was used to refer to the value of the vessel determined "as is, where is" as of the date of exchange 1) with consideration for placing the vessels in class with respect to hull and machinery excluding unknown bottom repairs or 2) if the vessel was being traded in and was not available for a full survey or is under a Use Agreement, an estimate of such class work or 3) if the vessel was being traded out being delivered in class from a previous trade in or use agreement, no allowance for such class work. The regulations did not use the term "adjusted value" but the reference to "adjustments" upon final determination referred under the circumstances to a reduction of the unadjusted value by the costs, among others, found necessary to place the vessel in class. "In class with respect to hull and machinery" and "in class" referred to all work necessary to place a vessel in such condition as would entitle it to the highest classification of the

American Bureau of Shipping and valid certificates of inspection from concerned regulatory bodies. The regulations also provided that an applicant under the Vessel Exchange Act might continue to use the traded-in vessels until completion of preparation of the traded-out vessels for normal commercial operation.

The Exchange Contract contained prvisions generally corresponding to the regulation provision on unadjusted, adjusted and fair and reasonable value and on the meaning of "in class". The parties agree in the Exchange Contract that the unadjusted fair and reasonable values of the *traded-out* vessels would be accepted as the fair and reasonable values. They agreed in Article 3 that the unadjusted values of the *traded-in* vessels (which were then at sea) would be adjusted by deductions for necessary in class work costs, deactivation and delivery work costs, all determined by the Contracting Officer after dry dock and a physical survey of the traded-in vessels prior to redelivery.

Despite being a party to the Exchange Contract, Sea-Land contends, and the Initial Decision recommends, that certain of these regulations and provisions of the Exchange Contract providing for the determination of fair and reasonable value are contrary to the Vessel Exchange Act. To analyze and resolve such contentions, it is necessary to set forth briefly the alleged relevant circumstances involving the vessel exchange under the Exchange Contract.

C. Pertinent Factual Circumstances

Three sets of ship exchanges have relevance or alleged relevance to determining the fair and reasonable values of the traded-in and traded-out vessels under the Exchange Contract.

The first ship exchange occurred on November 10, 1964, Under Exchange Contract No. MA-3740 McLean Industries, Inc. (McLean) traded in six vessels to the Government including the C-2's ARIZPA, WACOSTA and WARRIOR in exchange for six C-4 troopships traded out by the Government to McLean's subsidiary Waterman Steamship Co. (Waterman). The troopships were to be converted to containerships and would not immediately be available for operation. The parties therefore executed simultaneously Use Agreement No. MA-3741 under which the Administrator agreed that Waterman could use the six traded-in vessels in its service generally until the traded-out troopships were converted to containerships. Litton Industries Leasing Corporation (Litton) was to do the conversions and thereafter the traded-out vessels were to be chartered by Waterman to McLean's other subsidiary Sea-Land for operation in the latter's service.

Some time after McLean/Waterman had traded in the ARIZPA, WACOSTA and WARRIOR, McLean decided that their hulls and configurations would be better for conversions to containerships than the CHATHAN, COLORADO and FANWOOD in Sea-Land's fleet. McLean therefore sought to acquire back these three vessels through another ship exchange. Since Waterman had authority to operate the three vessels under an unexpired Use Agreement, McLean, Sea-Land, Waterman and Litton proposed that Waterman forego further operation of the three vessels under its Use Agreement and redeliver same at sea; that the Government accept same "as is, where is" and transfer title to the vessels simultaneously to Sea-Land; that Sea-Land accept simultaneously said vessels "as is, where is" at sea.[5] On

[5] This plan is indicated in Exhibit No. SC-19, a letter dated March 26, 1965 from Counsel to Sea-Land to MarAd, wherein it is stated:

"Inasmuch as the three C-2 vessels to be traded-in under this program are now operated in regular service, we

that basis the second ship exchange, presently under dispute, took place on May 13, 1965.

Under the Exchange Contract (MA-3856) Sea–land traded in to the Government three 21 years old C-2 vessels, the CHATHAN, COLORADO and FANWOOD, in exchange for the Government trading out to Litton the three C-2 vessels previously traded in, the ARIZPA, WACOSTA and WARRIOR. As with the prior ship exchange the traded-out vessels were to be converted to containerships and not immediately available for commercial operation. The parties therefore executed simultaneously Use Agreement No. MA-3857 under which the Administrator agreed that Sea-Land could use the traded-in vessels in the U.S. foreign and domestic commerce generally until the traded-out vessels were converted to containerships by Litton. After conversion the traded-out vessels were to be chartered to Sea-Land for operation in its service. Also, on that date, May 13, 1965, Waterman relinquished further operation under its Use Agreement No. 3741 and "redelivered" the vessels at sea to the Government "as is, where is" by an addendum to the previous exchange contract MA-3740.

The third set of alleged relevant ship exchanges occurred when the COLORADO, FANWOOD and

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request that use of such vessels be continued as substitutes for three of the vessels to be traded-out which are now in the Use Agreement to Waterman Steamship Corporation, our affiliate. In the event the substitution of the "Use" vessels cannot be effected under the present Use Agreement filed by Waterman for such vessels, then it is requested that use of the three vessels to be traded-in will be permitted for the period of the time required for the conversion of three of the C-2's to be traded-out."

See also the testimony of Captain Warren G. Leback, Sea-Land's principal witness, Tr. 104-105 in which he stated, among other things, that Sea-Land thereafter bareboat chartered the vessels to Waterman.

CHATHAM acquired by the Government under the Exchange Contract in issue, were traded out on April 7, and April 22, and August 18, 1966. The COLORADO was traded out to Conqueror Freighters, Inc. under Exchange Contract No. MA-4094 and the FANWOOD and CHATHAM to Waterman under Exchange Contract Nos. MA-4099 and 4179. At such times neither Waterman nor Conqueror Freighters was related to McLean or Sea-Land.

Under all three sets of ship exchanges the pertinent traded-in and traded-out vessels were assigned unadjusted values by MarAd's Ship Valuation Committee (SVC) as of the date of contract execution. Subsequently these values were adjusted (where required) by the Contracting Officer to reduce the unadjusted valuation by the costs of placing them in class and by certain other minor costs. The results were as follows:

SHIP VALUATIONS CA-43

I. Exchange Contract MA-3740 dated November 10, 1964, Between U.S.–McLean/Waterman

Traded-In Vessels	Unadjusted SVC	Adjusted 5/13/65
ARIZPA	$505,000	$505,000
WACOSTA	505,000	505,000
WARRIOR	495,000	495,000

II. Exchange Contract MA-3856 dated May 13, 1965, Principally Between U.S.–Sea-Land

Traded-In Vessels	Unadjusted SVC	Adjusted 8/24/67

CHATHAM	$468,000	$110,116.76
COLORADO	453,750	208,513.61
FANWOOD	458,500	206,715.33

Traded-Out Vessels	Unadjusted SVC	Adjusted 5/13/65
ARIZPA	$444,250*/	$444,250
WACOSTA	444,250*/	444,250
WARRIOR	453,750*/	453,750

III. Exchange Contract MA-4094 dated April 7, 1966, Between U.S.–Conqueror Freighters and Exchange Contracts 4099 and 4179 dated April 22 and August 18, 1966 Principally Between U.S.–Waterman

Traded-Out Vessels	Unadjusted SVC	Adjusted-After contract signing
COLORADO	$506,000*/	$251,000
FANWOOD	506,000*/	246,000
CHATHAM	523,750*/	167,750

*The change in the SVC unadjusted valuations for these vessels was solely attributable to market changes and not to any change in the manner of determining said value.

The adjusted valuation of the *traded-out* vessels (ARIZPA, WACOSTA and WARRIOR) under the Exchange Contract (MA-3856) involved the plan by McLean/Sea-Land to acquire these vessels notwithstanding Waterman's rights to operate them under its Use Agreement. This plan, as previously described, involved waterman foregoing its rights to the vessels and Sea-Land acquiring said vessels for operation under a

Use Agreement via the Government's and Sea-Land's acceptance of the vessels from Waterman on an "as is, where is" basis at sea. No further adjustment in valuation for these vessels were made under Exchange Contract MA-3856, and McLean/Waterman received the unadjusted valuation of said vessels without further adjustment under Exchange Contract MA-3740. These agreements enabled McLean and its subsidiaries to engage in these ship exchanges and at the same time not interrupt McLean's service.[6]

The adjusted valuation of the *traded-in* vessels (CHATHAM, COLORADO and FANWOOD) was made by the Contracting Officer after the vessels had been dry docked, physically surveyed and redelivered to MarAd on April 7, April 22, and August 18, 1966, respectively. The adjustments were principally for necessary class repair work indicated on detailed deficiency lists compiled as a result of the physical survey.

D. Judge's Initial Decision

Based on these detailed facts the Chief Administrative Law Judge in his Initial Decision concluded and recommended 1) that the Contracting Officer's adjusted

[6] Both Sea-Land and Waterman were subsidiaries to McLean prior to May 11, 1965, two days before Exchange Contract MA-3856 was executed. On that date Waterman became an independent company, but it agreed to the plan as proposed by McLean by foregoing its rights under its Use Agreement. Further, it was not until November 10, 1966, that Waterman was contractually relieved from further responsibility under Exchange Contract MA-3740. Waterman had sought to be released from its contractual obligations sooner. MarAd refused to permit any earlier release because of outstanding contractual obligations by Waterman.

valuation for the traded-in vessels and the MarAd regulations and Exchange Contract provisions which he followed were contrary to statutory requirements that the traded-in ship valuations be "as of the date of the exchange" and "in the same manner" as the traded-out ship valuations; 2) that the Contracting Officer's adjusted valuations for the traded-in vessels improperly required they retain class not just be placed into class, and also probably erroneously included adjustments for non-class items; 3) that the fair and reasonable values of the traded-in vessels as of the date of the exchange were the Ship Valuation Committee's values less the Contracting Officer's estimated in-class work necessary, but not to be performed ($120,000), and that the statute required a corresponding adjustment ($120,000) to the traded-out vessels, a requirement Sea-Land could not legally waive; 4) that the Vessel Exchange Act barred Sea-Land from recovering the resulting $38,000 excess value of the traded-in vessels ($1,260,250) over the traded-out vessels ($1,222,250); and 5) that the Use and Exchange Agreements were separate contracts and that the results of ship condition surveys performed upon redelivery under a Use Agreement represented items of possible litigation under the Disputes provision of the Use Agreement or by legal action for breach of contract.

E. Contentions of Parties

Staff Counsel vigorously excepts to the Initial Decision arguing generally that MarAd's ship valuation rules, regulations, and procedures and terms and conditions to which Sea-Land contractually agreed comply with the 1936 Act. He views the sole issue to be decided as whether the estimated deductible costs

are fair and reasonable, and he asserts the Contracting Officer's decision thereon should be affirmed. Sea-Land supports the Judge's decision adding that there is no authority to commingle the exchange contracts (3740 and 3856), that the separate MarAd claim under the Use Agreement for unperformed repairs is rasied too late but it will discuss or litigate the matter, and that in any event it is entitled to prompt refund of the $816,904.30 paid.

III.

DISCUSSION

With this background the dispute can be considered first in the context of whether the pertinent regulations and contractual provisions contravened the Vessel Exchange Act. This question requires considering 1) the interpretation of the statutory requirement that ship value be determined "as of the date of exchange"; 2) the applicability to this dispute of statutory amendments subsequent to the May 13, 1965 vessel exchange and the interpretation of the statutory requirement that the traded-in and traded-out ship values be determined "in the same manner"; 3) the interpretation of the statutory requirement that the cost of placing the vessels in class with respect to hull and machinery shall be considered in determining ship values. Thereafter, the fair and reasonable values of the traded-in and traded-out vessels under the Exchange Contract can be determined based upon the appropriate and lawful procedure. Finally, the applicability of the maintenance provision of Use Agreement MA-3857 to this dispute will be discussed.

A. Statutory Interpretations

1. Ship Valuation Shall Be "As of the Date of Exchange"

The Vessel Exchange Act provided at the time of the Exchange Contract:

> "The fair and reasonable value of the traded-in and traded-out vessels shall be determined, as of the date of exchange, pursuant to subsection (d) of this section."

The parties dispute the interpretation of the requirement that the valuation "shall be determined as of the date of exchange. There is apparent agreement that the "date of exchange" refers to the date of execution of the Exchange Contract, May 13, 1965, when title to the traded-in and traded-out vessels passed and that valuation "as of" the date of exchange evidently contemplates a valuation thereafter which is capable of taking effect on that date or "as if it were on that date."[7]

Sea-Land contends, however, and the Judge found and recommended, that the fair and reasonable valuations of the *traded-in* vessels were contrary to the statutory requirements ("shall" be determined as of the date of exchange) because the valuations took into account repair items determined about a year after the date of exchange and it cannot technically be determined which repair items ascertained from the survey were necessary as of the date of exchange, as opposed to a later date.

The requirement that the valuation "shall" be determined as of the date of exchange may either be a

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[7] *United States v. Munro-Van Helms Co.*, 243 F.2d 10, 13 (5th Cir. 1957); *Horwitz v. N.Y. Life Ins. Co.*, 80 F.2d 295, 299 (9th Cir. 1935).

mandatory ("must") or directory ("may") time requirement even though the ordinary meaning of the term "shall" is mandatory.[8] The general rule from court cases construing such term is as follows:

> "As a general rule, a statute which provides a time for the performance of an official duty will be construed as directory ["may"] so far as time of performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure."[9]

In applying that general rule the cases have turned ostensibly either on the legislative intent – both to the particular time provision and the general purpose of the statute – or, in the absence of evidence of mandatory intent, whether any harm or potential injury results to anyone from a mandatory interpretation.[10]

In the present case the phraseology of the Vessel Exchange Act with respect to the time provision appears merely to set forth an orderly process of reaching the valuation determination. The statute contains no negative words restraining the reaching of the adjusted valuation determination after the date of

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[8] *Sutherland, Statutory Construction* §5816 (3d ed. Horack 1943) & 1972 Supp.

[9] *Diamond Watch Co. v. United States*, 181 F.Supp. 952, 958-59 (Cust. Ct. 1960); *See* 50 Am.Jr. *Statutes* §23 (1944); 3 *Sutherland Statutory Construction*, §5816 (3d ed. Horack 1943) & 1972 Supp.

[10] See cases cited in 3 *Sutherland, Statutory Construction*, §5803 & §5816 (3d ed. Horack 1943) & 1972 Supp. The commentator observed with respect to these cases:

> "Although those considerations may be couched in terms of legislative intent, it is apparent that the decision rests on an inference of what the legislature can be presumed to have intended had it anticipated a situation that may have arisen in a particular case."

Id. at 101. In that context it is relevant to note that from virtually the inception of the Vessel Exchange program MarAd

exchange and no penalty for any delay in reaching the determinations. The absence of these expressions often signifies a directory legislative intent for the time provision.[11]

The Vessel Exchange Act also has no legislative history on this time provision. Hence, one can only be guided by the general purposes of that Act, namely to improve the type and suitability of U.S.-flag vessels and to further the policies of the 1936 Act, including encouragement of a merchant marine sufficient to carry all U.S. domestic and a substantial portion of U.S. foreign waterborne commerce. Those legislative purposes were furthered by the deferred valuation determination since Sea-Land's merchant fleet services continued to operate uninterrupted during the period of reconstruction of the traded-out vessels, thereby providing additional carriage of U.S. foreign waterborne commerce. Contrariwise, an immediate survey would have interrupted Sea-Land's commercial service, diminished U.S.-flag waterborne service until the traded-out vessels were reconstructed, and placed an unanticipated burden upon the owner's opportunity under the Exchange Act to upgrade its fleet.

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has permitted continued use of the traded-in vessels without prior layup for physical survey and, after the use, has adjusted the valuation. This administrative treatment was an accommodation to the realities of the needs of owners; MarAd did not deem Congress to have mandated the disruption of the operators' services in order for them to accept the opportunities afforded them by the Vessel Exchange Act to upgrade their services by the special authorization to acquire vessels from the National Defense Reserve Fleets. Moreover, Congress has been expressly made aware of such procedures and has reenacted the statute in 1965 with no change in the valuation procedure herein being discussed.

[11] *See* 82 C.J.S. *Statutes* §379 (1953).

Further, the circumstances of this dispute present no contravening consideration that would override the apparent directory construction of this statutory time requirement. The valuation determination was fixed on an unadjusted basis as of the date of exchange. If Sea-Land had redelivered the vessels in the assumed good condition it agreed to (Article 8 of the Exchange Contract and Clause 6 of the Use Agreement),[12] the valuation would have been unchanged from the in class valuation used as of the date of exchange. The adjusted valuation determination was reached as of a date immediately after termination of operation of the traded-in vessels, *i.e.*, the "redelivery" date. Sea-Land can scarcely complain of any injury from the deferred valuation determination since it was deferred largely at Sea-Land's behest so as to afford it continued use of the traded-in vessels and since the effect of the postponement was to defer any payments from Sea-Land as a result of that determination.[13]

Moreover, the consequences of accepting the Judge's view that a final, conclusive trade-in allowance must be established as of the date of the Exchange Contract would necessarily dictate that no contracts can be executed until after the traded-in vessel is dry docked

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[12]Article 8(a) provides

"(a) The shipowner agrees that when title to each Exchange Ship is transferred to the Government the Exchange Ship shall be in a condition to meet the in-class requirements of Article 3(c) of this Contract."

Clause 6 provides generally that the Charterer shall at its expense during the use period maintain the vessels and their parts in good and efficient operating condition.

[13]*See Maryland Cas. Co. v. Cardillo*, 99 F.2d 432, 434 (D.C.Cir. 1938) (statutory time provision for payment determination construed as directory – plaintiff could not complain as it had till March the next year rather than November to make payments.)

and surveyed and deductions determined of the costs of placing the vessel in class. While this admittedly would be the optimum procedure to avoid future disputes, it would vitiate the benefits to those owners wishing to upgrade their fleets but unable or unwilling to interrupt their commercial services.

Therefore, upon considering pertinent legal authorities, the Vessel Exchange Act, its legislative history and purpose, and the circumstances and consequences of this matter, I interpret the time provision as directory.[14]

2. Ship Valuation "In the Same Manner"

The Vessel Exchange Act making National Defense Reserve Fleet vessels available for acquisition by private operators was originally enacted for five years to expire on July 5, 1965, several months after the date of the exchange concerned herein May 13, 1965. The Act was extended effective October 10, 1965, with the following addition:

> "The value of a vessel when traded out shall be calculated *in the same manner* as its value was

[14]Whether the time provision is directory or mandatory it seems axiomatic that the "fair and reasonable value" to be determined as of the date of exchange is that reached upon final determination and not, as Sea-Land at least implies, the unadjusted value subject to further adjustments. Sea-Land's citation of the testimony of the Chairman of the Ship Valuation Committee "that the basic [unadjusted] value and the fair and reasonable value is the same thing as far as I understand" (Tr. 794) must be read with the Chairman's previous testimony. (Tr. 748, 750, 753) and regulations binding on him at that time (A.O. 197). This testimony can only be considered a statement that if a vessel were delivered with no necessity for adjustments, then the basic values would be the fair and reasonable values.

> determined when it was traded in, except that vessels traded in prior to October 1, 1960, shall be valued on the basis yielding the highest fair return to the Government commensurate with the purposes of this subsection. In each exchange of vessels under this subsection, the value of the vessel traded in, unless based on scrap value, and the value of the vessel traded out shall be calculated *in the same manner.*" (Emphasis added.)

The Chief Judge was persuaded that Congress passed the amendment because of instances cited by several industry witnesses "of inequitable administration of the valuation provisions comparable to the facts adduced in this record." He concluded a retroactive application of the amendment to the May 13, 1965 exchange was reasonable "because it merely effectuates, rather than changes, the basic policy of the earlier enactment which was to upgrade the non-subsidized fleet" and because retroactive application would cure and eliminate the "harsh consequences ... from administration of the original program...."[15]

If the Chief Judge's finding were accepted (that the requirement for) valuation "in the same manner" relates to class adjustments to unadjusted valuations) then that requirement cannot legally be retroactively applied to the Exchange Contract involved herein. Generally, unless the mandate of a statute is plain and compels the construction, a statute will not be interpreted retro-

[15]As a consequence of this statutory interpretation, the Chief Law Judge found that Section 375.8(k)(i) of MarAd's General Order 92 (barring an allowance for class work in the unadjusted value of a traded-out vessel redelivered in class from a trade-in or use agreement) and "corresponding portions of the Contract ... violate the statutory requirement that exchange and transfer vessels must be valued 'in the same manner' "; further that Sea-Land's agreement to accept the traded-out vessels as is, where is was without effect since Sea-Land "was without power to waive such [statutory] provisions."

actively.[16] Similarly, statutes are presumed to operate prospectively only unless there is clear statutory expression or legislative history to the contrary.[17] Nothing in the expressed language of the amendment ("value . . . shall be calculated in the same manner") or in the legislative history of the amendment indicates any intent to apply retroactively this amendment in the manner proposed by Sea-Land and the Chief Administrative Law Judge and neither the Judge nor this Board is authorized to amend existing contracts to incorporate after-enacted legislation.

The Chief Judge cited a different principle altogether, namely the legality of an admitted retroactive statute. The principle was correctly cited:

> ". . . Where . . . retrospective operation is curative and tends to alleviate harsh or unfair consequences *without injury to vested rights*, the presumption is in favor of the statute. . . ."[18]

Under the Exchange Contract the Government had a vested contractual right for vessel valuation based on a deffered survey according to an agreed upon adjusted procedure for the traded-in vessels and an unadjusted procedure for the traded-out vessels. Hence, the inapposite principle used by the Judge cannot retroactively be applied to the instant dispute for it would injure vested rights of the Government. Further, the Government entered into the Exchange Contract at the

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[16] 2 *Sutherland, Statutory Construction* §2201 (3d ed. Horack 1943) & 1972 Supp.; *United States v. Moore*, 95 U.S. 760, 762 (1877); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1927); *Brewster v. Gage*, 280 U.S. 327, 33[?] (1934).

[17] *E.g., Cox v. Hart*, 260 U.S. 427, 434 (1922); *Application of Commonwealth of Mass.*, 206 F.Supp. 106, 109 (D. Mass. 1962); *D.C. Transit Systems, Inc. v. Pearson*, 149 F.Supp. 18, 23 (D.D.C. 1957).

[18] Emphasis added. 2 *Sutherland, Statutory Construction* §3102 (3d ed. Horack 1943).

behest of the parties and under the circumstances of the two ship exchanges under MA-3740 and MA-3856. If the Government had any inkling that the parties would later contend that a subsequent statutory amendment would avoid the agreements undertaken, it would never have entered into such a contract.

Moreover, the Chief Judge misconstrues the purpose of the October 10, 1965 amendment. As Staff Counsel persuasively argues, it is not directed at allowances for repair items or class items on traded-in and traded-out vessels in respect to testimony of industry witnesses who protested MarAd's valuation procedures requiring extensive repair obligations.[19] Rather, the amendment was directed at concerns of Senator Williams over the unadjusted valuations, expressed on the floor of the Senate after hearings by both Senate and House

[19]The Judge cited testimony by Peter N. Teige, Vice President and General Counsel for American President Lines, Ltd., *Hearings on H.R. 728 Before the House Subcomm. on Merchant Marine*, 89th Cong., 1st Sess. 53 (1965), and by Harold Logan, Sr., Vice President for Grace Line, Inc., *Hearings on S.2069 Before the Senate Subcomm. on Commerce*, 89th Cong., 1st Sess. 18 (1965). Staff Counsel points out 1) The industry witnesses presented no evidence to support their charge that the repairs required by MarAd were unnecessary or that the amounts were excessive for the required work; 2) The Maritime Administrator disagreed with such testimony stating that in commercial practice vessel sales are related to the operating condition of the vessel and that MarAd's unadjusted valuations are made on the basis that the vessel is in good operating condition; (*Hearings on H.R. 728* at 72); 3) Both the Senate and House Reports concluded that the alleged inequities would best be remedied by administrative rather than legislative action; (S. Rep. No. 373, 89th Cong., 1st Sess. 3 (1965); H. Rep. 597, 89th Cong. 1st Sess. 4 (1965); and 4) The Conference Report, added the in-the-same-manner requirement based on Senator Williams' amendment which was concerned with the unadjusted values and in such report no reference was made, directly or indirectly, to MarAd's policy on valuations including repair obligations.

Committees on extension of the Vessel Exchange Act. The Senator was alarmed at the valuation of a given vessel traded out by the Government to an operator under the Ships Sales Act on a depreciated domestic sales price basis and then traded back to the Government on the basis of world valuations.[20] He proposed the following amendatory language:

> "The value of a vessel when traded out shall be calculated in the same manner as its value was determined when it was traded in."

In the joint conference on the extension of the Vessel Exchange Act Senator Williams' concept was also extended by use of identical language ("value . . . calculated in the same manner") to cover the use of the same formula in determining values of traded-in and traded-out vessels of the same exchange transaction. The conference also further clarified the amendment as applying to the unadjusted valuation and not repair or class items by incorporating two exceptions for certain unadjusted valuations.[21]

Hence, the legislative history of the amendment shows the amendment was not in response to harsh or unfair administration of repair or class items adjustments to unadjusted valuations but rather intended to assure the same unadjusted valuation formula for traded-in and traded-out vessels. The construction of the October 10, 1965 amendment is consistent with the

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[20]111 Cong. Rec. 22035-41 (Aug. 26, 1965).

[21]The first exception provided that vessels traded in prior to October 1, 1960 need not be valued upon trade out in the same manner as traded-in but rather shall be valued on the basis yielding the highest return to Government "commensurate with the purposes of this subsection [Section 510(i)]." The 1960 date was chosen because of a change in unadjusted valuation on that date by MarAd from restricted world market to an average of the domestic market and the restricted world market values. The second exception provided that the vessels upon trade in need not be valued in the same manner as the traded-out vessels if based on scrap value. Scrap value, of course, is related to the unadjusted valuation under Section 510(d).

legislative history of the original Vessel Exchange Act, which at least impliedly required that the traded-in and traded-out vessel shall be valued on the same basis.[22]

I conclude therefore that the October 1965 amendment cannot be retroactively applied to the Exchange Contract as interpreted by Sea-Land and the Chief Administrative Law Judge and that properly interpreted the amendment requires that traded-in and traded-out vessels shall be valued on the same unadjusted basis. I also find that even if the October 1965 amendment were to be applied as properly interpreted, to the fair and reasonable valuation under the Exchange Contract that the pertinent MarAd's regulations and corresponding provisions of the Exchange Contract, are consistent with that amendment.

3. Consideration of "Cost of Placing the Vessels In Class With Respect to Hull and Machinery"

The Vessel Exchange Act at the time of the exchange stated in pertinent part:

> "In determining said fair and reasonable value the Secretary shall consider the cost of placing the vessels in class with respect to hull and machinery. . . ."

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[22]For instance, the Comptroller General in commenting on the bill S. 2618, which became the Vessel Exchange Act, stated:

> "We assure from condition 4 that the values of the exchanged vessels are intended to be based on similar criteria to obviate any opportunity for wind-falls at the expense of the Government." S. Rep. No. 1275, 86th Cong. 2d Sess. 8 (1960).

The Comptroller General's reference to "condition 4" pertains to the first sentence of Section 510(i)(4) of the Act.

> "The value of the traded-out vessel which is in excess of the value of the traded-in vessel or vessels shall be paid in cash at the time of the exchange."

Purportedly, in pursuance of this requirement MarAd had published at the time of the exchange regulations, Section 375.2(d) of General Order 92, defining "in class with respect to hull and machinery" as follows:

> "In class with respect to hull and machinery" . . . shall . . . encompass all work necessary to place a vessel in such condition as will entitle it to:
>
> (1) The highest classification of the American Bureau of Shipping [ABS] for the specific type of vessel, and
>
> (2) Valid Certificates of Inspection for compliance with the regulations of the United States Coast Guard, the United States Public Health Service [PHS], and the Federal Communications Commission [FCC]."

The Exchange Contract contained essentially the same definition in Article 3(c) and further defined "in class work" as follows:

> "The term 'in class work' as applied in this Contract to an Exchange Ship means dry docking, surveying as required by the regulatory bodies, towage, and other work or services incidental to the survey, and all class requirements found during the course of the survey, as determined by the Contracting Officer based on delivery survey, taking into account the provisions of Article 7 of this Contract, but does not include the cost of the Shipowner's surveyors or agents, or any other overhead expenses."

Article 7(c) of the Exchange Contract indicates the nature of the survey, upon which the "in class work" is determined, as follows:

> "Each Exchange Ship shall be jointly surveyed by representatives of the Government and the Shipowner before delivery to the Government under this Contract to determine and state the condition

of the Exchange Ship. Such survey shall include the underwater parts of the Exchange Ship, and shall be of such scope as is reasonably necessary to determine the true condition of the Exchange Ship and its components including but not limited to the ship's hull, machinery, equipment, tanks, cargo spaces and compartments.

***Based upon the survey report there shall be established a listing of the in class work necessary on the Exchange Ship which is not to be performed prior to delivery for the purpose of making the determination required under Article 3(b)(3) of the Contract [fair and reasonable value determination]."

The parties dispute whether delivery of the traded-in vessels with the highest classification of the American Bureau of Shipping (ABS) and valid certificates of inspection from the U.S. Coast Guard, Public Health Service (PHS) and the Federal Communications Commission (FCC) fulfills this statutory mandate or whether the aforesaid regulations and contractual provisions are a proper interpretation of the statutory requirement as including the class requirement repair items found at the time of delivery of these vessels. The Chief Administrative Law Judge was persuaded that this requirement referred to work necessary to place the vessel in class with respect to hull and machinery as distinct from work necessary to *retain* class.

The "literal" meaning of the phrase "cost of placing the vessels in class with respect to hull and machinery" is not plain or apparent in the absence of a statutory definition of "in class." Further, there is nothing in the legislative history of the Vessel Exchange Act directly on the intention behind this phrase. Consequently, the interpretation must be found from the purpose of the fair and reasonable valuation and the purpose of the Exchange Act in general.

These purposes appear to indicate that the "in class" provision requires that there be an exchange of vessels in operating condition when determining fair and reasonable value. Thus, the Exchange Act purpose is stated to be "to improve the type and suitability [traded out] vessels *operating*" in the U.S. commerce. The valuation of traded-out vessels of the military type shall include the "cost of reconverting and restoring such vessels for *normal operation in commercial service.*" The traded-in vessels will either be subsequently traded-out[23] or placed in the Reserve Fleet and in both instances they must be prepared for subsequent operation.[24]

The operating of a U.S.-flag vessel is regulated primarily by the United States Coast Guard regarding safety and navigation (see 14 U.S.C. § 2), the PHS regarding health (see 42 U.S.C. § 269), the FCC regarding communications (see 47 U.S.C. §§ 351-394), and the ABS regarding classification of U.S. vessels (see

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[23]No provision of the Vessel Exchange Act requires the traded-in vessels to be redelivered for lay-up in a Reserve Fleet. As Staff Counsel points out, under such requirement Sea-Land could not have acquired the ARIZPA, WACOSTA and WARRIOR which were traded-in by McLean/Waterman rather than originating from a Reserve Fleet.

[24]The Maritime Administrator explained this point to the House Subcommittee on Merchant Marine in testifying on extending the Vessel Exchange Act:

> "... The purpose of maintaining the national defense reserve fleet is to provide additional vessels for use in the event of emergency.... In view of the purpose for which the national reserve fleet is maintained, we believe that vessels should be in good operating condition when they are placed in the fleet."

Hearings on H.R. 728, supra note 19, at 72. Of course, if the traded-in vessel is valued on an unadjusted basis at scrap, subsequent operation is not contemplated and no issue of class repair adjustments arises.

U.S.C. § 881). The ABS, a private organization, issues every four or five years a classification for cargo ships operating in the U.S. foreign ocean commerce. For such classification ABS requires after the initial ship construction a special periodical survey every four years, such as Second Special Survey No. 2, and compliance with repair items found as a result of the survey. A fifth year of grace before requiring reclassification may be permitted depending on the condition of the ship and the report of its last annual survey. The ships usually do not lose their classification by being stricken from the ABS record. The other agencies, Coast Guard, PHS and FCC issue certificates of inspection annually or biannually for such ships for compliance with their regulations which if withdrawn or not issued, restrict the operation of such vessels.

The traded-in vessels actually possessed at the time of redelivery the highest ABS classification and were generally in the final months of the fifth grace year. They also possessed valid certificates of inspection from the Coast Guard, PHS and FCC. Notwithstanding the fact that the traded-in vessels possessed the highest ABS classification and valid certificates of inspection, the survey reports of these vessels, prepared at the time of redelivery, revealed numerous class requirement repair items for these vessels, including some "presently outstanding" repair items under ABS requirements. These vessels would have been of greater value if these repairs had been performed.

From the foregoing, the most reasonable interpretation of "cost of placing the vessels in class with respect to hull and machinery" and which I conclude Congress to have intended is the cost of all class requirement work necessary to place a vessel in condition, as determined at the time of redelivery, to entitle it to the highest ABS classification and valid certificates of

inspection from the Coast Guard, PHS and FCC. Such interpretation gives consideration to the operating condition of these vessels so far as class requirements are concerned which these agencies regulate. It also gives consideration to the fair and reasonable value of the vessels as of the time of exchange as defined hereinabove. To accept Sea-Land's contention that only the existence of class certificates is considered would either value the vessel at the time the vessel received its class certificates (in the case of the ABS classification almost 5 years before redelivery in this instance) or fail to account fairly and reasonably for the condition of the vessel. Indeed, since a vessel could possess ABS classification and be anywhere from just through survey till in the year of grace or even past, failing to consider the operating condition of the vessel so far as class requirements are concerned would emasculate the fair and reasonable valuation purpose of the Act especially for vessels near the end of their economic lives of 25 years when extensive repairs are highly probable just to keep the vessels in operation.[25] Also, the Act appears to contemplate that in every exchange the factor of in class work shall be considered for valuation purposes and it would only be in the rarest of instances when a vessel lost its ABS classification or certificates of inspection.

Of further importance is the contemporaneous and practical interpretation of this statutory requirement by MarAd, the agency charged with administering the Vessel Exchange Act through the Secretary of Com-

[25]It is quite probable the Comptroller General would consider that such valuation would include an element of subsidy to Sea-Land. The Comptroller General has held the fair and reasonable valuation under the Vessel Exchange Act "in no circumstances may contain an element of subsidy." Comp. Gen. Decision, B-115883, August 11, 1953.

merce. MarAd's interpretation under the circumstances is entitled to great weight.[26] General Order 92 refers to "in class" as "all work necessary to place a vessel in such condition as will entitle it to" class certificates and MarAd has interpreted that requirement in administering exchange contracts since the passage of the Vessel Exchange Act to encompass class repair work necessary to retain and not just to have ABS classification and valid regulatory certificates. It is noteworthy that the Vessel Exchange Act was reenacted with the same provision for considering in class requirement without change, even though Congress knew of MarAd's interpretation of that provision.[27]

Finally, it is noteworthy that Sea-Land is a party to the Exchange Contract, which under Articles 3 and 7(c) of the Exchange Contract provided that a survey report would include "all class requirements found during the course of the survey" necessary on the traded-in vessels but which are not to be performed prior to redelivery. Such provisions would be entirely unnecessary if the parties understood the statute only to require delivery of the traded-in vessels with valid class certificates.

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[26] *E.G., United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940); *see generally* Note, *Nonlegislative Intent as an Aid to Statutory Interpretation*, 49 Col. L. Rev. 676, 679 (1949).

[27] *See, e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965). Sea-Land's contentions that Congress expressly disapproved of adjustments for any repair items is not supported by the legislative history of the extension of the Vessel Exchange Act which indicates that the Congressional concern was with unadjusted values, as discussed *supra* at 18-20.

B. Fair and Reasonable Value

1. Traded-Out Vessels

The Exchange Contract provisions on the fair and reasonable value of the traded-in and traded-out vessels, which are consistent with the above statutory interpretations are controlling. Under Articles 3(c) and 4(a) of that Contract Sea-Land agreed that the fair and reasonable values of the traded-out vessels were $444,250 each for the ARIZPA and WACOSTA, and $453,750 for the WARRIOR, as determined by the Ship Valuation Committee and the Contracting Officer pursuant to the Vessel Exchange Act. These figures represented the average of the domestic market value and restricted world market value of these vessles as of the date of exchange.

The Vessel Exchange Act requires that the fair and reasonable value of the traded-out vessels include consideration for the cost of placing the vessels in class with respect to hull and machinery. As noted *supra*, in agreeing to enter into the Exchange Contract the Administrator, McLean, Sea-Land, and Waterman agreed that since adjustments to the same vessels as traded in under Exchange Contract MA-3740 would be offset by the same adjustments to the same vessels as traded out under Exchange Contract MA-3856 and since McLean as the parent of Waterman under the first contract and as the parent of Sea-Land under the second contract, was the real party in interest,[28] no adjustment to the

[28]It should be noted that neither Sea-Land nor the Chief Law Judge seriously questioned that McLean was the real party in interest in both these contracts, even though technically Waterman became an independent company two days prior to execution of Exchange Contract MA-3856. As the Judge notes, the vessel exchange was actually accomplished and agreed to prior to execution of the contract. The same attorney

unadjusted valuation of the vessels under both contracts would be made. The Government omitted a pointless accounting procedure. Such omission was not barred by the statute which required that in substance such class work be *considered.* The statute did not require that the form of actually making such adjustment be made, if pointless. This course of action in addition reduced the time within which these vessels, the ARIZPA, WACOSTA and WARRIOR, returned to commercial operation by eliminating the time for dry dock and survey before reconstruction. Therefore, the procedure materially furthered the purposes of the 1936 Act and the Exchange Act by increasing and upgrading U.S.-flag service in U.S. foreign commerce.

Sea-Land argues that "1) the traded-in vessels under MA-3740 greatly exceeded the trade-out valuations and 2) there is no authority to commingle such contracts in any event." It is a fact that the unadjusted values of the six traded-in vessels under MA-3740 exceeded the unadjusted values of the six traded-out vessels by the difference of $3,000,000 to $2,640,000. However, whether the adjusted values of such traded-in vessels would have exceeded the adjusted values of such traded-out vessels at all or "greatly" cannot be determined because the ARIZPA, WARRIOR and WACOSTA were not dry docked and surveyed. Whether or not Sea-Land and McLean entered into Exchange Contract MA-3856

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represented Sea-Land and Waterman for purposes of negotiating these contract. Additional evidence of McLean's interest is that Waterman voluntarily agreed to forego further operation under its Use Agreement without any consideration as it would have almost certainly extracted if it were an independent company. Moreover, as stated in note 6 *supra*, although Waterman became an independent company on May 11, 1965, it was not until November 10, 1966, that it was contractually relieved from further responsibility under the predecessor exchange contract MA-3740.

based on such conjectured expectation is doubtbul and not at all proven or even contended. It is beside the point because the Vessel Exchange Act, under the circumstances of the pertinent vessel exchanges, permits consideration in Exchange Contract MA-3856 of the valuations in Exchange Contract Ma-3740. Such consideration of events of previous exchange contracts is scarcely "commingling of contracts."

Further, assuming that the requirement of valuing the traded-in and traded-out vessels in the same manner were to be imposed retroactively in this instance, the fair and reasonable valuation of the traded-out vessels herein does not contravene that requirement by failing to make adjustment expressly for such vessels as are made for the traded-in vessels. The valuation "in the same manner" requirement, as discussed *supra,* refers to the unadjusted valuation, which in this instance was made in the same manner for the traded-in and traded-out vessels. More fundamentally, the requirement is addressed to an equality of the valuation in any given exchange – that which is taken into account for the traded-out vessels were considered and taken into account resulting in the same substantive effect although not the same form as were considered and accounted for with the traded-in vessels so that there was an equality of valuation in the vessel exchange.

2. Traded-In Vessels

The fair and reasonable value of the traded-in vessels under the Exchange Contract is the unadjusted value less agreed upon adjustments. Under Article 4(a) of the Contract Sea-Land agreed that the unadjusted fair and reasonable values of the traded-in vessels were $468,000 for the CHATHAM, $453,750 for the COLORADO,

and $458,500 for the FANWOOD as determined by the Ship Valuation Committee and Contracting Officer pursuant to the Vessel Exchange Act. These figures represented the average of the domestic market value and restricted work market value of these vessels as of the date of exchange. They were based on the assumption that the vessels were in a good state of repair, in an efficient operating condition in accordance with good commercial maintenance practices, and in class without the need for any class repairs (Tr. 748, 750, 753).[29]

The agreed upon adjustments included uncontroverted costs for "deactivation and delivery" and for inventory deficiencies.[30] Also, under Article 3(b)(3) the adjustments included the cost of in class work on the traded-in vessels, necessary but not performed prior to delivery, as determined by the Contracting Officer, based upon a physical survey of the vessels in accordance with the provisions of Article 7. That Article provided that the traded-in vessels would be jointly dry docked and surveyed by the parties before redelivery to determine the true condition of the vessels. Based upon the survey two lists were to be compiled one of "required repair work" and the other

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[29]This assumption of the condition of the vessel in the Ship Valuation Committee valuation of these ships is not expressly made in the Committee's findings. The existence of such assumption in the findings is, however, convincingly proven by the testimony of the Chairman of the Committee at that time that such assumption was the basis of the Committee's findings (Tr. 748, 753) and by testimony that the appraisals from recognized brokers and appraisers used to reach such findings included the qualification that the vessels appraised were assumed to be "in class" and "in sound condition" (Tr. 750, 753, 756).

[30]Since the traded-in vessels were not placed in the Reserve Fleet but were immediately traded-out it was agreed that the vessels would not have to be delivered in lay-up status.

of "in class work necessary on the Exchange Ship which is not to be performed prior to delivery for the purpose of making the determination required under Article 3(b)(3) of this Contract." Thereafter, under Article 5, the Contracting Officer was to make a final estimate of such in class work not to be performed and of the aggregate fair and reasonable values of the traded-in vessels.

Each vessel was accordingly dry docked and surveyed. For each vessel there was compiled, attached to the condition survey, a list of deferred class work items or "deferred items, class repairs": for the CHATHAM a list of 240 items, for the COLORADO 45 items and for the FANWOOD survey 63 items. Representatives of Sea-Land attended each survey and signed without exception or reservation the ship survey report with the attached lists of deferred class work items. Sea-Land's principal witness acknowledged in testimony that these lists were agreed to by Sea-Land's signing the survey report (Tr. 81, 97-98, 110-114, 115-117) but denied any Sea-Land agreement that the items all referred in fact to class repairs.

Based on these lists the Contracting Officer estimated the costs of deferred class repairs on the CHATHAM, COLORADO and FANWOOD as $356,000, $255,000 and $260,000 respectively. Hence the fair and reasonable (adjusted) values of these vessels were determined pursuant to the Exchange Contract to be $110,116.76 for the CHATHAM, $208,513.61 for the COLORADO and $206,715.33 for the FANWOOD. These values included the costs for the uncontroverted adjustments.

The Chief Judge raised some question regarding MarAd's handling of the above referenced addenda of deferred class lists work items. He noted that Sea-Land's representative signed only a four page survey report which each had a heading "All Presently

Outstanding Classification and/or U.S.C.G. Requirements." The Judge claimed that under that heading only in one instance was there an outstanding item and that of nominal cost. The Judge also noted no cost breakdown on the deferred class item addenda was presented to Sea-Land until January 12, 1967, after the vessels had been transferred to Waterman and Conqueror.

The record reflects no impropriety by MarAd in this manner and no support of a conclusion that Sea-Land is not bound by its agreement to the lists of deferred class work items. Sea-Land's principal witness agreed in testimony that when Sea-Land's representative signed the four page survey reports the deferred class item lists were attached thereto (Tr. 80-81, 97, 109, 115). The reports list numerous items to be checked in the survey with the comment, "those that are commented upon with notes attached are indicated by a cross mark, thus (X)." All items were so marked and commented upon in one listing from which the lists of deferred class work were drawn, Since the comments were voluminous and were the heart of the survey and since the four page survey reports were very brief, it seems apparent that in signing the survey reports Sea-Land's representative was principally agreeing to such iteminzation in the attachments.

The reference to "All Presently Outstanding Classification and/or U.S.C.G. Requirements" in the survey reports is not an itemization of all in class work but an incomplete list of the outstanding requirements at the time of the survey formally recorded by the ABS or U.S. Coast Guard. All three vessels were due or overdue for ABS Second Special Survey No. 2. This fact was expressly stated in FANWOOD survey under this category of "All Presently Outstanding ... Requirements" but it was elsewhere mentioned on the same

page of the survey reports of the CHATHAM and COLORADO. Completion of ABS Second Special Survey No. 2 can well be an expensive task as testimony indicated.[31]

It appears that considerable time elapsed in notifying Sea-Land formally of the adjustment due under the contract for the deferred class repairs, although Sea-Land may have been notified informally by telephone or otherwise. The delay in notification, if any, has not adversely affected Sea-Land. Sea-Land makes no argument to the Board that the costs for the deferred class repairs are unreasonable but rather argues that certain items should not be considered.

The Judge also questioned whether the listed deferred class items included only items "with respect to hull and machinery" or indeed only class items. As discussed hereinabove, "the cost of placing the vessels in class with respect to hull and machinery" encompasses not only ABS requirements but also requirements of the Coast Guard, PHS and FCC. On that basis, the lists of deferred class repairs attached to the survey reports were prepared. The record indicates that all the items thereon were class items within the above understanding of the statute (e.g., Tr. 313, 377, 378, 383, 627, 693-94). There is no serious representation that one or more of the concerned federal regulatory agencies or ABS would not have most likely required such repairs. Therefore, it is concluded that the items

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[31]The precise cost of the survey and repairs incident to an ABS Second Special Survey No. 2 may vary immensely. Edward Ganly, and independent appraiser appearing for Sea-Land, testified that cost of the average amounted to $100,000 (Tr. 175-76) including repairs "required by the classification." (Tr. 191). The record shows that it cost $673,885.26 to repair the SS CLAYBOURNE in 1967 for "a special survey and other work" (Tr. 193-194, SC-4).

listed by the Contracting Officer were in class work items contemplated by Article 3(b)(3) of the Exchange Contract and by the Vessel Exchange Act.

Sea-Land and the Chief Judge further contend that the Contracting Officer's "fair and reasonable" valuation of the traded-in vessels with adjustments for deferred class items is erroneous and unreasonable as shown 1) by the fact such value was midway between the domestic and foreign scrap values despite the fact the vessels were fit for service, 2) by the testimony of Edward F. Ganly, a ship surveyor and appraiser that the fair and reasonable value really approximated the unadjusted value, and 3) somewhat by contemporaneous values given the vessels for purposes of war risk insurance pursuant to MarAd General Order 32. In lieu of the Contracting Officer's determination the Judge determined his own value as fair and reasonable both for the traded-in and traded-out vessels.

The fact that the traded-in vessels CHATHAM and FANWOOD were fit for limited service after redelivery did not indicate they had a higher market value. Like any operating equipment a ship may have a market value of near scrap and remain operational. Moreover, the continued operation of these vessels proved that the Contracting Officer's values were fair and reasonable. The subsequent operator of the vessels, Waterman, paid a considerable amount just to attain limited one voyage trip and then further amounts to repair the vessels for subsequent service (CHATHAM $571,698 total and FANWOOD $431,111 total). Those repair expenses quite obviously affected the market value of 21-23 year old C-2 vessels.

Mr. Ganly's testimony seemed to indicate that the particular state of condition of the vessel was irrelevant to the commercial market value and hence the unadjusted values of the vessels, which assumed the

vessels were "in class" and "in sound condition", were the fair and reasonable values. There is contrary evidence (Tr. 49, 50, 768-69). Whatever might be the situation with respect to the private market in determining ship values, Congress has stated that in a ship exchange the cost of placing the vessels in class with respect to hull and machinery should be considered in determining the fair and reasonable values of traded-in and traded-out vessels. That cost includes, as discussed hereinabove, the class requirement repair items found at the time of redelivery of the vessels.

The war risk insurance values which approximated the unadjusted values are established without survey and dry docking and simply are not relevant to determining the fair and reasonable values determined by survey after redelivery as was done with these ships. Those insurance values are based on domestic market value and assume a given condition of the vessels. Moreover, the war risk values in 1966 and later reflect the very considerable expenses paid by Waterman and Conqueror to repair the vessels for subsequent operation.

The Chief Judge determined that the fair and reasonable values of the traded-in and traded-out vessels were their unadjusted values less $40,000 per vessel as an estimated cost of necessary in class repairs. There is no evidence of record at all to support the $40,000 estimate as final repair costs and such a deduction for the traded-out vessels under the circumstances of this exchange transaction is contrary to the Act, the regulations and the Exchange Contract, requiring a survey and itemization and pricing of such repairs, as previously discussed.

Finally, Sea-Land and the Judge contend that the Contracting Officer's fair and reasonable valuation of the traded-in vessels and subsequent trade-out to

Waterman and Conqueror credited the latter companies with the cost of the ABS Second Special Survey No. 2 which "was tantamount to involuntary and unalwful subsidization of Waterman and Conqueror by Sea-Land." Staff Counsel has given a full and complete reply to this wholly unfounded charge:

> "What the Chief Examiner fails to show is that the amounts deducted from these unadjusted values for the cost of needed class repairs was the same on trade-in by Sea-Land as on trade-out to Waterman and Conqueror Freighters.
>
> The market values of the vessels are affected by the cost of repairs that are needed when the vessels change hands. A buyer will not pay for repairs that are needed on a vessel when he acquires it.
>
> If the cost of the repairs due to Sea-Land's use of the vessels had not been deducted from the trade-out values to Waterman and Conqueror Freighters, those companies would not have acquired the vessels, and they would have gone into lay-up. However, Sea-Land would still be liable to the Maritime Administration in the amount now involved in this case." (Exceptions and Brief, pp. 67-69.)

C. Use Agreement

The Chief Judge also recommended in his Initial Decision that the determination of Sea-Land's liability under the maintenance provision of the Use Agreement be set down for appropriate administrative or legal proceedings as soon as practicable. This recommendation was occasioned by his finding that Sea-Land had no liability under the Exchange Contract as contended by the Government, but that the Government could

raise the issue by administrative or judicial suit under a maintenance provision in the Use Agreement which "fully protects the Government from redelivery of vessels in a poor state of repairs." He properly noted that the Use Agreement was not before him since there had been no decision by the Contracting Officer under the Use Agreement.

Sea-Land indicates it is prepared to deal with the Use Agreement. It raises several issues regarding any Government suit under the Use Agreement, including, "what repair items are attributable to the period of the Use Agreement and which items are attributable to the period *prior* to the Use Agreement." (Reply, p. 6)

Staff Counsel argued that Sea-Land was liable under both Agreements, that Sea-Land's repair obligations under the Use Agreement are broader than under the Exchange Contract, and that to the extent costs are recovered under the Exchange Contract they will reduce Sea-Land's maintenance obligation under the Use Agreement.

In view of the conclusion hereinabove that Sea-Land is liable under the Exchange Contract for $816,904.30 the immediate basis for the Chief Judge's recommendation is no longer applicable. For other reasons, however, it is a sound recommendation that the dispute on the maintenance provision of the Use Agreement be finalized by the Contracting Officer promptly.

On December 2, 1970 the Contracting Officer wrote Sea-Land that it failed to comply with the maintenance and repair provisions of the Use Agreement and owed the Government $967,921 for repairs that Sea-Land should have performed on the vessels under the Use Agreement prior to redelivery to the Government. The Contracting Officer stated that if no agreement could be achieved with Sea-Land in a reasonable time, he would render a final decision on the matter. Sea-Land

made no reply to this letter and the Contracting Officer has made no final decision.

If the Contracting Officer were to adopt the $967,921 figure, then Sea-Land would owe about $150,000 under the Use Agreement more than under the Exchange Contract. While it would have been consolidated, certainly now any liability of Sea-Land under the Use Agreement should be immediately determined so as to not further prolong the final determination of Sea-Land's total liability arising from the ship exchange on May 13, 1965. Since the merits of the Use Agreement dsipute is not before me at this time I in no way intend or state any position on that dispute other than the desirability of its being resolved or decided promptly.

IV.

CONCLUSION

For the foregoing reasons I find and conclude that the fair and reasonable values for the traded-in and traded-out vessels under Exchange Contract No. MA-3856 are those as determined by the Contracting Officer on August 24, 1967. The recommendations of the Chief Judge in that regard are hereby expressly rejected and Sea-Land's appeal is dismissed with prejudice.

For the record, I am also directing on this date that the dispute by Sea-Land regarding its liability under the maintenance provision of the Use Agreement be reduced to a Final Decision of the Contracting Officer within 14 days.

SO ORDERED BY THE
ASSISTANT SECRETARY OF
COMMERCE FOR MARITIME
AFFAIRS

Date: December 6, 1972

/S/JAMES S. DAWSON, JR.
Secretary

APPENDIX C

EXHIBIT A

SERVED
MAR 5 1971
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARTIME SUBSIDY BOARD

DOCKET NO. CA-43

SEA-LAND SERVICE, INC.

Appeal Re:
Fair and Reasonable Value of Exchange Ships

In the matter of the appeal of Sea-Land Service, Inc., from the decision of the Contracting Officer dated August 24, 1967, adjusting downward the fair and reasonable value of the exchange ships, CHATHAM, COLORADO and FANWOOD, traded in for the transfer ships, ARIZPA, WACOSTA and WARRIOR, pursuant to Contract No. MA-3856.

INITIAL DECISION OF
PAUL N. PFEIFFER, CHIEF HEARING EXAMINER

Served Upon:

Gerald A. Malia, Esq., Ragan & Mason, 900 17th Street, N.W. Washington, D. C. 20006

John B. Beach, Esq., Staff Counsel, Maritime Administration, Washington, D. C. 20235

RECOMMENDATIONS

It is recommended that:

1. Sea-Land be reimbursed in the full amount of $816,904.30 previously paid to MarAd in order to perfect the subject vessel exchange.
2. The determination of Sea-Land's liability under the maintenance provision of the Use Agreement be set down for appropriate administrative or legal proceedings as soon as practicable.

Exceptions to the initial decision will be due within twenty (20) days after service date shown above. Replies will be due within twenty (20) days of service of exceptions.

PRELIMINARY STATEMENT

This is an appeal taken by Sea-Land Service, Inc. (Sea-Land) under Article 16, the Disputes Clause of Vessel Exchange Contract No. MA-3856 (Contract), from a final decision rendered by the Contracting Officer (C.O.) on August 24, 1967. Said decision held Sea-Land liable in the amount of $734,904.30 representing the

remaining difference between the values assigned to three Sea-Land trade-in (exchange) C2 vessels and three Government-owned trade-out (transfer) C2 vessels. Sea-Land had previously paid $82,000 to MarAd on the date of the exchange based upon the higher values then assigned to the transfer vessels.

The principal question to be determined is whether values ultimately assinged by C.O. for both the exchange and transfer vessels were "fair and reasonable" as required by the Vessel Exchange Act (the Act).[1]

BACKGROUND OF THE DISPUTE

Under the authority granted by the Act, Sea-Land filed an application and entered into negotiations with the Maritime Administration (MarAd) toward the exchange of various older vessels it owned and operated for more modern vessels owned by the Government. These negotiations culminated in the execution of the named contract on May 13, 1965, under which Sea-Land acquired three Government-owned 21-22 year old C2 vessels, the ARIZPA, WACOSTA and WARRIOR (hereinafter referred to as either trade-out or transfer vessels), then under Use Agreement and operation by Waterman S.S. Co. (Waterman), in exchange for three 21 year old C2 vessels, the CHATHAM, COLORADO and FANWOOD (hereinafter referred to as either trade-in or exchange vessels). During the negotiations for the Exchange Contract, Sea-Land and Waterman were both subsidiaries of McLean Industries, Inc., Waterman becoming an independent company on May 11, 1965,

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[1] P.L. 86-575, 74 Stat. 312 (1960), Section 510(i), Merchant Marine Act, 1936, as amended, specifically by P.L. 89-254, 79 Stat. 980, approved October 10, 1965.

two days before the execution of the Exchange Contract. The attorney who previously represented Waterman in connection with an earlier agreement covering the ARIZPA, WACOSTA and WARRIOR, also negotiated the Exchange Contract on behalf of Sea-Land and later represented Waterman in connection with the acquisition of the Sea-Land exchange vessels by Waterman.

Sea-Land accepted the transfer vessels "as is, where is" without the benefit of a prior condition survey, title being conveyed to Litton Industries Leasing Corporation which was to convert the vessels into containerships and charter them back to Sea-Land. A major element of the transactions was the fact that the transfer vessels were more suitable for conversion into containerships than the exchange ships.

Having urgent need for tonnage during the anticipated period of conversion due to the Vietnam military buildup and the tightening of restrictions against Liberian and Panamanian registry, Sea-Land simultaneously entered into Use Agreement No. MA 3857 with MarAd under which the carrier retained and operated the three exchange vessels until completion of the conversion of the transfer vessels.

The exchange vessels being at sea and therefore not immediately available for condition survey, and the transfer vessels having been accepted "as is . . . ," the following "unadjusted" values were established by the MarAd Ship Valuation Committee (S.V.C.) for each of the vessels:

CHATHAM	$468,000	ARIZPA	$444,250
COLORADO	453,750	WACOSTA	444,250
FANWOOD	458,500	WARRIOR	453,750
	$1,380,250		$1,342,250

In determining these values, the S.V.C. took into account such factors as age, speed, deadweight capacity, bale/cubic capacity, gross weight, time before next special survey, domestic and foreign scrap values, depreciated value, and domestic, foreign and restricted world market values. According to the S.V.C.'s determination, Sea-Land owed the Government nothing since the exchange vessels were more valuable than those it received.

The C.O. adopted these values as "unadjusted fair and reasonable" values and incorporated them into Article 4(a) of the Contract. However, the Contract further provided that the exchange vessels would be subject to physical survey upon redelivery in accordance with General Order (G.O.) 92, and that, from the values set forth above, an additional $40,000 per vessel was to be deducted representing the "estimated cost of in-class work necessary, but not to be performed." On the other hand, the Contract did not provide for any further adjustment to the "unadjusted" values of the *transfer* vessels either as a result of an actual survey or as a deduction for the estimated cost of class work necessary but not to be performed.

On the basis of this Contract Sea-Land paid $82,000 to MarAd, representing the lower value of the exchange vessels after the $120,000 deduction. The exchange vessels were redelivered to MarAd consecutively on April 7, April 22 and August 18, 1966, each having undergone Second Special Periodical Survey No. 2 immediately prior thereto.

Upon completion of the surveys, a report was compiled for each vessel.[2] Each form consisted of the

[2] In accordance with the Contract, Art. 7(c).

four page official MarAd Ship Survey Report, MA 58, a list of deferred work, various drydock, engine and gear reports and work sheets, followed by what has been variously entitled "Addendum to Condition Survey . . . Corrective Measures for Deferred Class Work," "Addendum to Condition Survey . . ." and "Specificiations for Repairs of Deferred Items Class Repairs." The latter list consisted, in the case of the CHATHAM, of 240 items. It is noteworthy that all lists indicated that the subject vessel was in possession of all required certificates relating to class, each valid and with no noted exceptions.

At the bottom of page 1 of Form MA-58, the following box-caption appears:

> "ALL PRESENTLY OUTSTANDING CLASSIFICATION AND/OR U.S.C.G. REQUIREMENTS (Indicate report numbers, dates, ports and any other pertinent data.)"

In the case of the CHATHAM the following notation appears in the space below the caption:

> "Repair working areas in way of A and B strakes, Port and Starboard sides between frames No. 76-1/2 to 84-1/2 and between frames No. 114-1/2 to 119-1/2. Supply and install missing shot of 2-1/8" stud link anchor chain on port side."

In the comparable space on the COLORADO report, the notation read:

"A.B.S. Survey Report No. 567 dated June 7, 1965, Karachi. See Survey Item #64(a)."

Item #65(a) stated:

> "Third stage feed water heater ABS report No. 567 dated June 7, 1965 recommends permanent repairs at owner's convenience. Two tubes were found leaking, surface of tube plate rough and wasted in way of one leaking tube and the gasket between the tube plate and covers not bearing on the tube-plate.

> One tube was renewed and the tube holes in the way of the wastage were plugged and gaskets were made good as per ABS report."

The sole indication on the MA-58 report for the FANWOOD was:

> "A.B.S. - 2nd Special Survey #2 to be completed."

The Act,[3] regulations,[4] and the Contract[5] anticipated that the exchange vessels were to be redelivered for lay-up in a Reserve Fleet. However, some time prior to actual redelivery, MarAd had received the applications of, and had been negotiating with, Waterman and Conqueror Freighters, Inc. (Conqueror) for the trade-out of the exchange vessels. Subsequently, these carriers did, in fact, obtain the vessels upon their redelivery to the Government at the termination of the Use Agreement.

The reports, without cost data, were submitted and received by Sea-Land shortly after their completion. However, it was not until January 12, 1967, that the C.O. transmitted a cost breakdown to Sea-Land. Several attempts over a protracted period to have the parties meet and agree on compromise cost figures proved fruitless. Finally, at a meeting with MarAd on June 26, 1967, Sea-Land contended that it was not liable for any of the items on the report as the vessels had all requisite class certificates on board and valid at all relevant times.

In a decision dated August 24, 1967, the C.O. deducted $356,000, $255,000 and $250,000, respectively, from the values of the vessels. This result in final "adjusted" values as follows:

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[3] Subsections (3), (8) (A) & (B).

[4] 46 CFR §375.3(i)-(1).

[5] Article 3(b)(2), 3(f), 5, 7(b)(c)(e)(f), *et al.*

CHATHAM	$110,116.76
COLORADO	208,513.61
FANWOOD	206,715.33

Subsequently, on October 30, 1967, Sea-Land paid under protest the balance of $734,904,30 owing after an initial payment of $82,000 made on the date of exchange,[6] and filed the instant appeal. The matter was referred by the then Acting Maritime Administrator to the Chief Hearing Examiner on September 8, 1967, and, following the usual discovery process, a public hearing was held, terminating on December 2, 1970. Opposing briefs were submitted by Counsel for Sea-Land on December 21, 1970, and by Staff Counsel on January 11, 1971, on which date the case was submitted for Initial Decision.

CONTENTIONS OF THE PARTIES

Counsel for Sea-Land has contended throughout this appeal: that due to their greater deadweight capacity the exchange vessels were of greater value than the transfer vessels; that the exchange vessels were at all relevant times "in class"; that the repair cost of the only "class" item reflected on the three condition survey reports was covered by the $40,000 deduction made by the C.O. and reflected in the Contract; that the C.O. made further deductions from the values assigned in the Contract for items relating to *condition* and to "retain" class, whereas the Act speaks in terms of *placing* a vessel in class; that since the vessels were all in class, there can be no deduction made from their values for costs allegedly

[6] Sea-Land claims duress by MarAd officials who, it asserts, threatened to delay another ship exchange pending payment.

incurred to *place* them in class; that the transfer vessels, though in comparable survey position, were not surveyed, nor was any adjustment made in their values as set out in the Contract; that such was contrary to the express language of the Act which requires that both exchange and transfer vessels be valued in the same manner; that Sea-Land did not waive this requirement by a contractual agreement to accept the transfer vessels "as is, where is"; that Sea-Land is entitled to recover the total amount, $816,904.30 paid to MarAd.

Staff Counsel, on the other hand, has urged: that the decision of the C.O. is entitled to presumptive validity; that said presumption can be overcome only if shown to be wrong by clear and convincing evidence; that Sea-Land has failed to present such evidence and, therefore, the decision of the C.O. must be affirmed; that the conduct of the C.O. was in conformance with the rules and regulations promulgated by MarAd to administer the Vessel Exchange Act; that the Contract conforms with the applicable rules and regulations; that Sea-Land expressly agreed to accept the values assigned to the transfer vessels without further adjustment pursuant to the "as is, where is" delivery provision of the Contract; that Sea-Land accepted and agreed to the survey reports without notation of exceptions of any item; that Sea-Land has failed to prove that any item contained on the condition survey reports was improperly included; that if the cost of the repair items deducted from the SVC values is fair and reasonable, the fianl values for each vessel are fair and reasonable; that Sea-Land is responsible for such items regardless of whether they existed at the date of the exchange or arose during the period of the Use Agreement; that Sea-Land is not entitled to any recovery; and that the appeal should, therefore, be dismissed with prejudice; that the Use Agreement and the Contract are to be considered as one.

DISCUSSION

In accordance with the Board's recent order,[7] it is clear that the instant proceeding is *de novo* in character and, consequently, no presumptive validity attaches to decision of the C.O.

There are three strata of legal authority to be considered: the Congressional enactment, the MarAd regulations and the Contract. It is significant that the Vessel Exhange Act, although independently enacted, is amendatory to the Merchant Marine Act, 1936, and consequently, the policy and objectives attendant to the latter are germane.[8]

The clear and unambiguous language of the Act in effect on the date of the exchange imposes the following mandatory requirement on MarAd:

> "The *fair and reasonable value* of the traded-in and traded-out vessels shall be determined, *as of the date of the exchange* . . ."[9] (Emphasis added)

By its terms the Act was destined to expire July 5, 1965. In connection with its extension several industry witnesses cited instances of inequitable administration of the valuation provisions comparable to the facts adduced in this record.

Both the Senate Report No. 373, 89th Cong., 1st Sess. 3 (1965), and the House Report No. 597, 89th Cong., 1st Sess. 4 (1965), concluded that the alleged inequities would best be remedied by administrative rather than legislative action. However, the Conference Report No.

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[7] Ruling of the Maritime Subsidy Board in *Grace Line Inc. v. Bethlehem Steel Corporation,* Docket No. CA-44, January 20, 1971, reversing, in effect, *Lykes Bros. Steamship Co., Inc. v. Bethlehem Steel Co., Inc.*, Docket No. CA-3, February 15, 1968, 9 SRR 1159.

[8] 1 Sutherland, STATUTES AND STATUTORY CONSTRUCTION 2d, §1935.

[9] The Act, subsection (2).

1085, U. S. Code Cong. & Ad. News, 89th Cong. 1st Sess. 1965, Vol. 2 at 3570, indicated a contrary conclusion and recommended inclusion of the following language in Section 510(i)(2) which was formally enacted effective October 10, 1965:

> "The value of a vessel when traded out shall be calculated in the same manner as its value was determined when it was traded in . . . In each exchange under this subsection, the value of the vessel traded in, unless based on scrap value, and the value of the vessel traded out, shall be calculated in the same manner."

A retroactive application of this amendment to the May 13, 1965 exchange is reasonable because it merely effectuates, rather than changes, the basic policy of the earlier enactment which was to upgrade the non-subsidized fleet. (House and Senate Reports, *supra* at 2).[10]

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[10]See 2 Sutherland, STATUTES AND STATUTORY CONSTRUCTION 2d, §3102:

> ". . . Where . . . retrospective operations is curative and tends to alleviate harsh or unfair consequences without injury to vested rights, the presumption is in favor of the statute." (Citations omitted)

That harsh consequences had resulted from administration of the original program is clear from the testimony given at hearings held prior to amendment and extension of the Act. The statement of Peter N. Teige, Vice President and General Counsel for American President Lines, Ltd., is illustrative:

> "It has been the erratic policy that has developed in recent years with respect to repairs which the operators must make to the vessels before delivering them to the Government. Under circumstances when no repairs will be required for commercial sale, the Maritime Administration has, in a number of instances, required repairs before trade-in which have exceeded $250,000. Since these repair obligations are not fixed until after the vessel's operator has contracted to trade in his vessel, the effect of this policy has been a sort of Russian roulette. In other words, he doesn't know how much repair he will have to make to the vessel until he has committed himself." Hearings before

Under the first provision it is clear that if, in fact, a survey is necessary to determine the fair and reasonable value of a vessel, such survey must ("shall") be accomplished as of the date of exchange which, in this case, was May 13, 1965. Despite the fact that the exchange vessels were at sea on the date of the exchange, there was no statutory authority to use a survey conducted roughly one year later for ship valuation purposes. Although such procedure was authorized by General Order (G.O.) 92,[11] as then in effect, the

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the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, House of Representatives 89th Congress, 1st Session on H.R. 728, "A bill to broaden the vessel exchange provisions of Section 510(i) of the Merchant Marine Act, 1936, to extend such provisions for an additional five years, and for other purposes." June 8, 1965, at 53.

The problem was restated by Harold Logan, Sr., Vice President of the Grace Line. Mr. Logan says:

> "It is the position of the Committee of American Steamship Lines that 5 years of experience with the Vessel Exchange Act have demonstrated certain inequities which require its amendment if the entire U.S. vessel replacement program, subsidized and non-subsidized, is to function effectively. These inequities are caused by:
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> * * *
>
> 2. Undervaluation by the Government of our ships on being traded in and;
>
> 3. The Maritime Administration requirement that excessive repair be accomplished on ships before trade-in."

He continues,

> "Briefly, we would like to see language in S. 2069 which would require the Government to place a fair value, based on the higher of the foreign or domestic price, upon the vessels we are trading in and to follow normal commercial practices regarding the repairs required prior to delivery of the ships in the reserve fleet." Hearings before the Subcommittee on Commerce, U.S. Senate, 89th Congress, 1st Session on S. 2069. June 11, 1965, at 18.

[11] 46 CFR 375.3 (k) (3).

regulation was contrary to the express language of the statue and, therefore, is not legally valid. In *Dixon v. United States*, 381 U.S. 68, 74 (1965), the Supreme Court quoted *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936) as follows:

> " 'The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . .but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.' "

By the same token a contract negotiated by the C.O. in derogation of a statutory provision is similarly invalid.

Nevertheless, the Government was amply protected under a maintenance provision in the Use Agreement which also required a survey before redelivery[12] in accordance with corresponding provisions of the Exchange Agreement. And, the Ship Valuation Committee's determination also protected the Government by deducting $20,000 per ship to "place each vessel in fair survey position," thus amortizing the cost of putting the vessels through survey.

Thereafter, the C.O. deducted an additional $40,000 per exchange vessel representing "the estimated cost of in-class work necessary but not-to-be performed." It is arguable that no such deduction was appropriate since technically all the vessels possessed valid class certificates, and consequently there was no "cost of placing the vessels in class with respect to hull and machinery."[13] However, as a practical matter the ships were at sea and

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[12]Part II, Clauses 2 and 6.

[13]Section 510(i)(3).

could not be immediately surveyed. Conceivably survey as of the date of exchange would have revealed defects requiring repair in order to place the vessels in class. Thus, the action of the C.O. in deducting $40,000 per vessel for such costs was reasonable under the circumstances.

Applying the statute to the facts, it is evident that the C.O.'s values for the *exchange* vessels on the exchange date are properly their final values. However, Sea-Land may be liable for the cost of repairs required by the subsequent surveys under the maintenance provision of the Use Agreement, a matter which has not been before any Contracting Officer and therefore not involved in this appeal.

Section 375.3(k)(l) of G.O. 92 provides:

> "*No allowance* shall be included in the unadjusted fair and reasonable value *for class work* on a *transfer* vessel being delivered in class from either a trade-in or use agreement and delivered to an applicant prior to layup in a Reserve Fleet." (Emphasis added)

This regulation and the corresponding portions of the Contract which fail to provide for a deduction from the value of the transfer ships covering the estimated cost of in-class work necessary but not to be performed are also invalid since they violate the statutory requirement that exchange and transfer vessels must be valued "in the same manner." It is equally reasonable to assume that the transfer vessels coming off Use Agreement from Waterman had class defects requiring repair.

Staff Counsel asserts that Sea-Land waived the statutory requirement for valuation of the exchange and transfer vessels "in the same manner" by accepting the transfer vessels on an "as is, where is" basis. However, since the statute, as previously noted, is mandatory rather than precatory in this regard, Sea-Land was without power to waive such provisions. *Rough Diamond Co. v.*

United States, 351 F.2d 636, 639 (Ct. Cl., 1965), *Sprague Steamship Co. v. United States*, 172 F. Supp. 674, 675 (Ct. Cl., 1959), *Southeastern Oil Florida v. United States*, 119 F. Supp. 731, 734 (Ct. Cl., 1953).

The phrase "as is, where is" has reference to quality factor or specific condition of the vessels being transferred[14] and indicates that there is no applicable warranty; it is, in effect, a disclaimer of warranty.[15] The use of this phrase in no way relieved the C.O. of his statutory obligation to *value* the trade-in and trade-out vessels in the same manner and as of the date of the exchange. In other words, even though Sea-Land accepted the transfer vessels "as is, where is," their values, like the values assigned to the exchange vessels, should have reflected fair survey position as of the date of the exchange and the estimated cost of passing Second Special Periodical Survey No. 2.

The testimony proffered during the Staff presentation is barren of detailed evidence of ship value as of the date of the exchange other than the values as set by the Ship Valuation Committee (S.V.C.). The then Chairman, Ludwig C. Hoffman, testified that the values established by the Committee were based upon a recent representative sale of a vessel of the same or similar type in fair survey position with adjustments made to reflect difference in age, speed, bale/cubic capacity, deadweight tonnage and actual survey position.

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[14]"The significance of the words 'as is, where is,' seems to be free from doubt and to refer to the condition of the article sold. The phrase qualifies the state in which it shall be delivered [and where]. The identity of the article sold is fixed; condition only is uncertain." *W.E. Hedger Co. v. United States*, 42 F.2d 553, 554 (S.D.N.Y., 1930). Also see *Stalik v. United States*, 247 F.2d 136, 139 (10 Cir., 1957); *American Sanitary Rag Co. v. United States*, 161 F.Supp. 414, 415 (Ct. Cl., 1958).

[15]U.C.C. §2-316(3)(a).

Fair survey position was considered to be midway between surveys which are due every four years plus a discretionary year of grace. The sum of $10,000 per year represented the cost of conducting the survey (opening, closing, inspecting and audio-gauging). Hence, since all the exchange and transfer vessels were four years from last survey, the S.V.C. properly deducted $20,000 from the base value of each vessel.

Mr. Hoffman confirmed that the values set forth in Article 4(a) of the Contract were the "fair and reasonable" values of the subject vessels in accordance with Section 510(i)(2) of the Merchant Marine Act.[16]

Following the S.V.C. method, the adjusted values for each vessel would be as follows:

	CHATHAM	COLORADO	FANWOOD
Unadjusted value in actual survey position	$468,000	$453,750	$458,500
Estimated cost of necessary in-class repairs	– 40,000	– 40,000	– 40,000
	$428,000	$413,750	$418,500

Applying the S.V.C. method to the transfer vessels, the following are their adjusted values:

	ARIZPA	WACOSTA	WARRIOR
Unadjusted value in actual survey position	$444,250	$444,250	$453,750
Estimated cost of necessary in-class repairs	– 40,000	– 40,000	– 40,000
	$404,250	$404,250	$413,750

[16]Tr. 793-4.

The total value of the exchange vessels would, therefore, be $1,260,250, $38,000 more than the total value of $1,222,250 for the transfer vessels. On this basis Sea-Land would owe MarAd nothing.

In testimony of similar purport, Edward F. Ganly, a ship surveyor and appraiser, stated on behalf of Sea-Land that the appropriate manner in which to arrive at the market price of the subject vessels at the time of the exchange would be to derive a value per deadweight ton (dwt) applicable to all vessels of a given class through an analysis of recent sales of such vessels with appropriate adjustments to equalize differences in age, speed, tonnage and survey position. This value is then multiplied by the deadweight tonnage of the subject vessels, the results being the equivalent of the S.V.C.'s "unadjusted fair and reasonable value." In his opinion, however, a greater amount, $20,000 per year for each year beyond last survey, should be deducted from the value representing the cost of conducting the survey *and* performing the necessary in-class repairs. In the instant exchange, this would result in a total reduction of $80,000 per vessel and would be roughly equivalent to the S.V.C. valuation, plus the C.O.'s reduction of $40,000 per vessel for "estimated cost of in-class work necessary, but not to be performed, . . ."

Using Mr. Ganly's method, the following values are obtained:

	CHATHAM	COLORADO	FANWOOD
Total dwt	10,873*	10,637*	10,632*
Value/dwt	x $42.95	x $42.95	x $42.95
Unadjusted value**	$466,995	$456,859	$456,644

Adjustment for survey position	– 80,000	– 80,000	– 80,000
Adjusted value	$386,995[16a]	$376,859	$376,644[16a]
	ARIZPA	WACOSTA	WARRIOR
Total dwt	10,840*	10,368*	10,471*
Value/dwt	x $42.95	x $42.95	x $40.80
Unadjusted value**	$465,578	$465,306	$427,217
Adjustment for survey position	– 80,000	– 80,000	– 80,000
Adjusted value	$385,578	$365,306	$347,217

* Based on official MarAd dwt
** Figures rounded off

A comparison of the Ganley results with those of the C.O. as adjusted herein for the transfer vessels reveals the following:

	Ganly	C.O. (Adj.)		Ganly	C.O. (Adj.)
CHATHAM	$386,995	$428,000	ARIZPA	$385,578	$404,250
COLORADO	376,859	413,750	WACOSTA	365,306	404,250
FANWOOD	376,644	418,500	WARRIOR	347,217	413,750

Under both methods the exchange vessels are clearly more valuable than the transfer vessels.

Staff Counsel correctly argues that the statute requires that the fair and reasonable value of the vessels be determined "pursuant to subsection (d) of section

[16a] Reference to Waterman's Section 605(c) application in Docket S-242 reveals dwt figures for CHATHAM and FANWOOD of 11,050, close to Ganly figures (11,461 and 11,220, respectively). On this basis, these vessels would be valued at $394,598 each.

[510]." and that said subsection (d) allows such value to be determined based upon a consideration of:

> ". . . (1) the scrap value . . . in American and foreign markets, (2) the depreciated value . . ., and (3) the market value therefor for operation in world trade or in the foreign or domestic trade of the United States."

He further points out that the Comptroller General has interpreted this provision to mean that after due consideration of each of the three elements, any one or combination may be selected as controlling.[17] Staff Counsel contends that this is precisely the method employed by S.V.C.[18] However, he ignores the fact that the values as set forth by the C.O. in the contract, although stated as "unadjusted", closely approximated the *market* values of the vessels in accordance with Section 510(d)(3), *supra.*

However, after the surveys were completed more than a year later, the C.O. fixed the final "adjusted" values which were almost midway between the domestic and foreign *scrap* values,[19] the first factor designated in the Act. That this was error is clear from the fact that all three exchange vessels, upon repair, were fit for and remained in service.[20] At least two of the ships, the CHATHAM and the FANWOOD, are in service at the present time.

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[17] Decision of the Comptroller General, B-115883, August 11, 1953.

[18] Compare Exh. SLS-FFF, GGG with Exchange Contract, Art. 4(a).

[19] Domestic scrap $70,000; European scrap $200,000; Far East scrap $210,000. Exhibit SLS-FFF.

[20] Actually the CHATHAM and FANWOOD each proceeded on a 40-50 day European voyage for Waterman before the 2nd special survey was completed. (Tr. 263)

Indicative, although not controlling, are the values contemporaneously given these vessels for purposes of war risk insurance in accordance with the provisions of General Order 82:[21]

January 1965	CHATHAM	$485,000
	COLORADO	485,000
	FANWOOD	485,000
July 1965	CHATHAM	$505,000
	COLORADO	505,000
	FANWOOD	505,000
January 1966	CHATHAM	$555,000
	COLORADO	555,000
	FANWOOD	555,000
July 1966	CHATHAM	$610,000
	COLORADO	(not listed)
	FANWOOD	610,000

Indeed, the values most recently assigned in the 23rd Revision of General Order 82, as of July 1, 1970,[22] substantially exceed the C.O.'s 1966 valuation:

	C.O. Valuation 1966	G.O. 82 Valuation 1970
CHATHAM	$110,116.76	$270,000
COLORADO (U.S. MATE)	208,513.61	270,000
FANWOOD	206,215.33	270,000

[21] As published in the Federal Register for the respective dates. The corresponding values for the ARIZPA, WACOSTA and WARRIOR are not properly considered herein as the published valuations reflect their containerization hence, a far greater value.

[22] 35 Fed. Reg. 18949 (1970).

Since the Act was drafted for the benefit of the *unsubsidized* segment of the U. S. Merchant Marine, "in no circumstances may the allowance of credit contain an element of subsidy."[23] Nevertheless, as appears from the following table, Waterman and Conqueror received vessels at prices considerably lower than those then obtainable on the open market and, in effect, at Sea-Land's expense. At the time of redelivery the Vietnam war had substantially escalated with the result that the exchange vessels, originally destined for lay-up in the Reserve Fleet, had become considerably more valuable for operational use. This fact was recognized by the S.V.C. in its unadjusted valuation of the exchange vessels on trade-out to Waterman.

COMPARATIVE VALUES

	On Trade-in				On Trade-out 1966	
	S.V.C. 3/30/65	C.O. 5/13/65	Ganly 5/13/65	C.O. Adj. 1966	S.V.C. Unadj.	C.O. Adj.
CHATHAM	$468,000	$428,000	$386,995	$110,116	$523,750	$167,750
COLORADO	453,750	413,750	376,859	208,513	506,000	251,000
FANWOOD	458,500	418,500	376,644	206,715	506,000	246,000
	$1,380,250	$1,260,250	$1,140,498	$525,344	$1,535,750	$664,750

Further, Counsel for Sea-Land correctly suggests that there is a distinction between the statutory requirement that deductions be made for work necessary to *place*[25] a vessel in class with respect to hull and machinery as clearly expressed by the statute, and deductions for work

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[23] Comp. Gen. Decisions, B-115883, August 11, 1953; Sec. 510(i)(1) Merchant Marine Act.

[24] Staff Counsel's Brief, at 56, 58, 60.

[25] Section 510 (i)(3) provides:

"(3) In determining said fair and reasonable value the Secretary shall consider the cost of *placing* the vessels in class *with respect to hull and machinery*. . ." (Emphasis added)

necessary to *retain* class. Sea-Land charges that Staff Counsel has commingled the two obligations. If Staff Counsel's approach were accepted, Sea-Land would, in this case, be debited with the expense of repairing the exchange vessels originally destined for lay-up in the reserve fleet in order that they might retain class for an additional four years (five years including a year of grace), thereby crediting Waterman and Conqueror with the cost of the Second Special Periodical Surveys and repairs. Such a discount from the sales prices was tantamount to involuntary and unlawful subsidization of Waterman and Conqueror by Sea-Land.

Staff Counsel has raised a number of arguments concerning the items of class work contained in the three vessel survey reports. He urges, in particular, that since Sea-Land had not taken exception to any item when presented with the reports, and did not show at the hearing that any items had been improperly included, appellant is properly charged with the cost of each item.

While not attacking the items individually, Counsel for Sea-Land has suggested that since each vessel was in class when redelivered, none of the items is properly charged and further that there was some degree of impropriety in that Sea-Land was not informed of the cost breakdown until six months after the itemized survey reports had been presented.

The testimony casts considerable doubt upon the adequacy of notice given Sea-Land as to the nature and extent of the so-called in-class work found necessary in the survey reports. In the first place, the signature concurrence of the Sea-Land representative appears at the end of the four page form MA-58 – SHIP SURVEY REPORT. Looking at the three reports under the headings on page one entitled "ALL PRESENTLY OUTSTANDING CLASSIFICATION AND/OR U.S.C.G. REQUIREMENTS" (underlining supplied), in only one instance was there an outstanding recommendation – a

$34,519 item relating to the CHATHAM easily covered by the C.O.'s estimated $40,000 deduction in the Contract. The data under this heading on the COLORADO referred to item 65(a) of the attached list, which, upon perusal, appears to have been satisfied by Sea-Land prior to redelivery. Secondly, the attached itemized lists were not signed by Sea-Land's representative and, as previously stated, contained no cost breakdown. Such was not made available to Sea-Land until January 12, 1967, long after the vessels had been sold to Waterman and Conqueror at prices in excess of their valuation to Sea-Land but so low as apparently to include a substantial credit for estimated alleged in-class repairs and, in any event, substantially under their then market value.

Another problem revealed by the record is whether numerous items on the lists attached to the survey reports such as, replacement of cove tile, repair of door hinges, connection of a toilet bowl, for example, constituted class items "with respect to hull and machinery" as set forth in section 510(i)(3) of the Act.

Inasmuch as the Act requires that both the exchange and transfer vessels be valued as of the date of the exchange and in the same manner, arguments relating to subsequent condition of the vessels are not relevant to an appeal under the Exchange Contract. Rather, such arguments may appropriately be raised in a dispute under the Use Agreement which fully protects the Government from redelivery of vessels in a poor state of repair. The logic of this distinction is that the value of the vessels at the date of exchange cannot be altered by events occurring thereafter. Thus, for the same reason that Sea-Land cannot benefit from the substantial increase in vessel market value that occurred after May 13, 1965, due to the escalation of hostilities in Vietnam, neither can Sea-Land be properly penalized by deducting from trade-in value the cost of maintenance and repair of the

vessels where the items of wear and tear may have occurred, at least in part, since the exchange date.

Finally, Staff Counsel argues that the Exchange Contract and Use Agreement, which were simultaneously entered into and cross-referenced with respect to redelivery obligations, must be construed as a single instrument and therefore Sea-Land is liable in this proceeding for the cost of repairs necessary upon redelivery of the vessels under the Use Agreement as a deduction from their values.

The difficulty with Staff Counsel's argument is that despite the fact that the redelivery and survey provisions[26] under the Use Agreement and the Exchange Contract are expressly inter-related, there is a separate addtional "Maintenance" obligation in the Use Agreement[27] under which,

> "CLAUSE 6. *Maintenance*. The Charterer shall, at its own expense, maintain the Ship, its machinery, boilers, appurtenances, and spare parts during the period of the Ship's use under this Agreement in good state of repair and in efficient operating condition and in accordance with the good commercial maintenance practices and shall keep the Ship in such condition as will entitle the Owner at all times to all required certificates, including, without limitations, the highest classifications and rating for Ships of the same age and type in the American Bureau of Shipping and with unexpired Marine Inspection Certificates of the United States Coast Guard, the United States Public Health Service, and the Federal Communications Commission."

The instant proceeding is concerned only with an appeal from the decision of the Contracting Officer under

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[26] Use Agreement, Part I, Clause H; Part II, Clause 2.

[27] Part II, Clause 6.

the Exchange Contract. There never has been an administrative proceeding and decision by any contracting officer under the Use Agreement. Therefore, no consideration can properly be given herein, nor decision rendered upon, any claim for failure to maintain the vessels under the Use Agreement until a contracting officer has issued a final decision thereon. Consequently, it will be recommended that this proceeding be remanded to a contracting officer designated under the Use Agreement for appropriate administrative decision thereunder. Possibly the issue could be more appropriately raised by a suit against Sea-Land for breach of the maintenance provisions of the Use Agreement. In either event, the matter is not before the undersigned on this appeal and no opinion is expressed herein as to the merits thereof.

In summary, the Staff's method of dealing with Sea-Land appears to have been extremely high-handed. The fact that Sea-Land was and is a highly successful carrier in comparison with Waterman is immaterial. Under the American system of justice, rich and poor alike are entitled to treatment which is equal, fair and reasonable.

The evidence presented describes precisely the kind of situation intended to be remedied by the Congress in its 1965 amendment to the Vessel Exchange Act.[28] Since MarAd was acting only technically as a purchaser in the transaction and in effect became a broker between Sea-Land and Waterman/Conqueror, it was not entitled to enrich itself to the extent of $816,900 at the expense of Sea-Land. On the other hand, Waterman has received a windfall in the form of bargain prices for vessels greatly in demand whose market value had substantially escalated.[29] In retrospect, left to its own devices in the

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[28] p. 11 *supra.*

[29] The record shows comparable U.S. C2 sales in 1966 ranging from $605,000 – $670,000 (Exhibit SLS-EEE).

open market and without the intervention of the Government, it is probable that Sea-Land could have reaped a profit from the overall transaction instead of suffering a $816,900 loss since the exchange vessels were $38,000 more valuable than the transfer vessels at the date of the exchange, and presumably equally more valuable one year later.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, it is found:

1. That contrary to Section 510(i)(2) of the Merchant Marine Act of 1936, as amended, which requires valuation of exchange and transfer vessels as of the date of the exchange and in the same manner, the Contracting Officer (a) deducted $120,000 from the valuations previously established by the Ship Valuation Committee for three Sea-Land C2 exchange vessels covering the estimated cost of in-class work necessary, but not to be performed, and failed to make a corresponding adjustment in the values of the three then Government owned C2 vessels being transferred to Sea-Land which were $38,000 less valuable than the exchange vessels; and (b) reduced the values of the three exchange vessels resulting in a net additional payment to MarAd by Sea-Land of $734,904.30 on the basis of condition surveys performed upon redelivery from operation under a Use Agreement approximately one year after the date of exchange, said reduction occurring more than six months after the exchange vessels had been sold to Waterman S.S. Co. and Conqueror Freighters, Inc., at prices substantially less than current market value;

2. That consequently Sea-Land was unlawfully required to pay the sum of $816,904.30 to MarAd in order to perfect said vessel exchange.

3. That the values established by Ship Valuation Committee for the exchange vessels minus an adjustment of $40,000 per exchange vessel for estimated in-class work necessary, but not to be performed, represent the fair and reasonable values of said vessels as of the date of the exchange;

4. That in conformance with the statute, a corresponding adjustment was required for the transfer vessels, which could not legally have been waived by Sea-Land;

5. That the results of ship condition surveys performed upon redelivery under a Use Agreement do not properly affect vessel valuation as of the date of exchange, but rather represent items of possible litigation to be resolved within the Disputes provision (Part II, Clause 32) of the Use Agreement or possibly by legal action for breach of contract.

6. That to the extent that G.O. 92 and the Contract provisions conflict with the statutory requirements, the regulations and the Contract are invalid;

7. That based upon the foregoing considerations and all the evidence of record, the following are found to be the fair and reasonable values of the subject vessels:

Exchange Vessels		Transfer Vessels	
CHATHAM	$428,000	ARIZPA	$404,250
COLORADO	413,750	WACOSTA	404,250
FANWOOD	418,500	WARRIOR	413,750
	$1,260,250		$1,222,250

8. That pursuant to Section 510(i)(4) of the Merchant Marine Act of 1936, as amended, Sea-Land may not recover the excess value of the exchange vessels over the transfer vessels.

RECOMMENDATION

It is therefore recommended that Sea-Land be reimbursed in the full amount of $816,904.30 previously paid to MarAd in order to perfect said vessel exchange.

It is further recommended that the determination of Sea-Land's liability under the maintenance provision of the Use Agreement be set down for appropriate administrative or legal proceedings as soon as practicable.

/s/ Paul N. Pfeiffer
PAUL N. PFEIFFER
Chief Hearing Examiner

February 23, 1971

APPENDIX D

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON, D.C. 20235

August 24, 1967

In Reply Refer To: 528(d)

Sea-Land Service, Inc.
P.O. Box 1050
Elizabeth, New Jersey 07270

Attention: Mr. M.R. McEvoy
President

Gentlemen:

Subject: Sea-Land Service, Inc./Litton Industries Leasing Corporation Exchange Application No. 139, Contract MA-3856, Exchange of CHATHAM, COLORADO, FANWOOD for the Government-owned ARIZPA, WACOSTA, WARRIOR

Reference is made to our letter of January 12, 1967, in which a breakdown was furnished concerning the values and allowances with respect to the subject ships which we proposed to use as a basis for final settlement of the exchange transaction under Contract MA-3856. Your reply of January 20, 1967, requested an opportunity to review the matter and stated you would contact us to set a time for discussion. By letter of January 23, 1967, we advised we would be happy to discuss the matter at your earliest convenience and by letter of February 28, 1967, we requested your prompt advice as to when you

wished to review the matter with us. A meeting was held on June 26, 1967, and further discussions have taken place between representatives of your company and the Maritime Administration. After full consideration of the information furnished and further review of the survey reports covering the deficiencies on each Exchange Ship, we can find no basis for modifying the findings set forth in our letter of January 12, 1967. Accordingly, the following are the Contracting Officer's final determinations of the excess value of the Transfer Ships over the Exchange Ships as provided in Article 5 of the subject contract.

Transfer Ships	ARIZPA	WACOSTA	WARRIOR
1. Fair and reasonable value per Article 4(a) of Contract No. MA-3856			
Plus –	$444,250.00	$444,250.00	$453,750.00
Exchange Ships	**CHATHAM**	**COLORADO**	**FANWOOD**
1. Unadjusted fair and reasonable value per Article 4(a) of Contract No. MA-3856			
Plus –	$468,000.00	$453,750.00	$458,500.00
2. Allowance for non-class work performed in lieu of "deactivation and delivery" work			
Minus –	Not required	$ 11,169.00	$ 10,482.00
3. Determined fair and reasonable costs of unperformed in-class repairs			
Minus –	$356,000.00	$255,000.00	$260,000.00

4. Determined fair and reasonable value of inventory deficiencies of expendable equipment and spare parts Equals –	$ 1,883.24	$ 1,405.39	$ 2,266.67
5. Adjusted fair and reasonable values of the Exchange Ships	$110,116.76	$208,513.61	$206,715.33

Determination of Final Settlement

1. The aggregate fair and reasonable value of the Transfer Ships ARIZPA, WACOSTA, and WARRIOR per Article 4(a) of Contract No. MA-3856	$1,342,250.00
2. The aggregate adjusted fair and reasonable value of the Exchange Ships CHATHAM, COLORADO, and FANWOOD	$ 525,345.70
3. Final determined excess of the aggregate fair and reasonable value of the Transfer Ships ARIZPA, WACOSTA and WARRIOR over the aggregate adjusted fair and reasonable value of the Exchange Ships CHATHAM, COLORADO and FANWOOD. (Difference between Item No. 1 and Item No. 2 above)	$ 816,904.30

4. Amount paid to the Government by Sea-Land Service, Inc./Litton Industries Leasing Corporation per Article 2(a) of Contract No. MA-3856	$ 82,000.00
5. Difference between Item No. 3 and Item No. 4 represents the payment due and payable to the Government by Sea-Land Service, Inc./ Litton Industries Leasing Corporation	$ 734,904.30

Under Article 2(b) of the Contract the Shipowner, agreed, within 10 days after receipt of the Contracting Officer's determinations, to pay to the Government in cash the amount due, which totals $734,904.30. It will be appreciated if you would forward the above amount due, in certified funds, as promptly as possible but in any event no later than the 10-day period provided in the Contract. Your check should be made payable to "Maritime Adm-Commerce."

The above constitutes the final and conclusive decision of the Contracting Officer as set forth in Article 16 of Ship Exchange Contract MA-3856.

Sincerely yours,

/s/H.E. STEFFES
H.E. Steffes, Chief
Office of Property and Supply

cc:
Litton Industries Leasing Corporation
9370 Santa Monica Boulevard
Beverly Hills, California 90213

Ragan & Mason
900 17th Street, N.W.
Washington, D.C. 22006

APPENDIX E

Wunderlich Act, 41 U.S.C. §321-322

Section 321 of Title 41 of the United States Code provides:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 322 of Title 41 of the United States Code provides:

> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

APPENDIX F

Merchant Marine Act, 1936, as amended, 46 U.S.C. §1160(i)

Subsection (i) of Section 1160 of Title 46 of the United States Code provides:

> In order to improve the type and suitability of vessels operating in the domestic and foreign commerce of the United States, and to further the policies of this chapter, the Secretary of Commerce is authorized (subject to the provisions of this subsection) to acquire at any time before July 5, 1972, vessels of one thousand five hundred gross tons or over which were constructed in the United States in exchange for more modern or efficient oceangoing vessels of one thousand five hundred gross tons or over owned by the United States. Such exchanges shall be subject to the following conditions:
>
> (1) The traded-in vessel shall have been owned by a citizen or citizens of the United States, documented under the laws of the United States, and shall not have been operated with operating-differential subsidy under subchapter VI of this chapter by the applicant or any affiliate of the applicant for at least three years immediately prior to the date of the exchange.
>
> (2) The fair and reasonable value of the traded-in and traded-out vessels shall be determined, as of the date of the exchange, pursuant to subsection (d) of this section. The value of a vessel when traded out [sic] shall be calculated in the same manner as its value was determined when it was traded in [sic] except that vessels traded in prior to October 1, 1960, shall be valued on the basis yielding the highest fair return to the Government commensurate with the

purposes of this subsection. In each exchange of vessels under this subsection, the value of the vessel traded-in, unless based on scrap value, and the value of the vessel traded-out shall be calculated in the same manner.

(3) In determining said fair and reasonable value the Secretary shall consider the cost of placing the vessels in class with respect to hull and machinery, and, with respect to any traded-out vessels of the military type, the cost of reconverting and restoring such vessels for normal operation in commercial service. The Secretary of Commerce shall consult with and obtain the approval of the Defense Department before any vessel of a military type is traded-out under the provisions of this subsection. In determining the value of the traded-in vessel or vessels the Secretary may take into consideration the cost to the owner of compliance with subparagraph (8), clauses (A) and (B), of this subsection.

(4) The value of the traded-out vessel which is in excess of the value of the traded-in vessel or vessels shall be paid in cash at the time of the exchange. No payments shall be made by the United States to the owner of a traded-in vessel in connection with any exchange under this subsection.

(5) A contract shall be entered into under this subsection by any person acquiring a traded-out vessel, which shall provide (A) that in the event the United States shall, through purchase or requisition or otherwise, reacquire ownership of said vessel, at any time within twenty years of the date of construction thereof, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the fair and reasonable exchange value determined under this subsection (together with the actual cost of capital improve-

ments thereon) depreciated to the date of such purchase or acquisition, or the fair and reasonable scrap value of such vessel, as determined by the Secretary of Commerce, whichever is the greater; (B) that such determination shall be final; (C) that in computing the depreciated exchange value of such vessel, the depreciation shall be computed on the vessel on the schedule adopted or accepted by the Secretary of the Treasury for Federal income tax purposes as applicable to such vessel; (D) that such vessel shall remain documented under the laws of the United States for a period of at least five years after the date of the exchange, or twenty years form the date of its construction, whichever is the later date; and (E) that the foregoing conditions respecting requisition or acquisition of ownership by the United States and documentation shall run with the title to such vessel and be binding on all owners thereof. Any other conditions respecting purchase or requisition by the United States heretofore applicable by statute to any traded-out vessel are made inapplicable to such vessel.

(6) Neither subsection (e) of this section, nor the nontaxable exchange provisions of the Internal Revenue Code, shall apply to the exchange of vessels under this subsection.

(7) Any repairs or reconversion necessary at the time of the exchange to place the traded-out vessel in class and prepare it for commercial operation shall be performed in a shipyard within the continental United States.

(8) The owner of the traded-in vessel, at his own expense and in a manner satisfactory to the Secretary of Commerce, shall (A) effect deactivation and preparation of the traded-in vessel and its equipment for storage or layup; (B) make delivery of such vessel and its equipment at a location

designated by the Secretary of Commerce; and (C) execute a bond, with one or more approved sureties, conditioned upon indemnifying the United States from all loss resulting from any lien against such vessel existing at the time of the exchange.

(9) Except where traded out for use exclusively in trade and commerce on the Great Lakes, including the Saint Lawrence River and Gulf, tanker vessels may be traded out under the provisions of this subsection only for major conversions into dry cargo carriers or liquid bulk carriers, including natural gas carriers but excluding bulk petroleum carriers.